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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 448.

DAVID T. WILENTZ, J. H. THAYER MARTIN and WALTER R. DARBY, Etc., *et al.*,

Appellants,

vs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF OF APPELLEE.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 448.

DAVID T. WILENTZ, J. H. THAYER MARTIN and WALTER R. DARBY, Etc., *et al.*,

Appellants,

vs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF OF APPELLEE.

(1) Reference to official report of opinion below:

The opinion of the three-judge court below is reported at 23 Federal Supplement 23 and is entitled "Sovereign Camp, Woodmen of the World *v.* David T. Wilentz, *et al.*"

(2) Statement of the grounds on which jurisdiction of this Court is invoked:

For this statement the court is referred to the "Statement under Rule 12" filed herein by Appellants.

(3) Statement of the case:

This statement of the case is necessary to supplement that contained in the Appellants' brief. Appellee herein is the Sovereign Camp, Woodmen of the World, a fraternal benefit life insurance association organized and existing under the laws of the State of Nebraska. Appellants Wilentz, Martin and Darby are, respectively, the Attorney General, the State Tax Commissioner and the Commissioner of Municipal Accounts of the State of New Jersey, as and constituting a state commission known as the "Municipal Finance Commission"; Appellants Kircher, Weber and Hirsch are members of the Board of Assessors of the Borough of Runnemede, a municipal corporation of the State of New Jersey, and Appellant Spencer is Tax Collector of said Borough.

This is an equitable action heard by a three-judge court convened pursuant to Section 266, Judicial Code (28 U. S. C. A., Sec. 380) wherein Appellee obtained an injunction against the continued operations of the Municipal Finance Commission of the State of New Jersey in the Borough of Runnemede, insofar as such operations interfere with the efforts of Appellee to obtain payment of a judgment of the Appellee against the School District of the Borough of Runnemede, and holding unconstitutional the provisions of Article III-A of the Municipal Finance Commission Act of the State of New Jersey, as amended and supplemented. Said Article III-A was made applicable to school districts co-terminous with a municipality under the protection of the Commission by Chapter 195, P. L. N. J. 1935. Section 17 of Chapter 258, P. L. N. J. 1935, substantially re-enacted said Article III-A with express reference to co-terminous school districts. These statutes,

(Article III-A of the 1931 Act, as amended and supplemented, and Section 17 of Chapter 258, P. L. N. J. 1935), are printed herein as Appendix A (p. 75, *et seq.*), and will hereinafter be referred to as the "stay provisions of the Municipal Finance Commission Act", or collectively as "Article III-A".

The gist of Appellee's action is, that at the time of the issuance of the bonds now owned by Appellee, which form a basis for the judgment herein mentioned, the statutes of the State of New Jersey provided for a plain, speedy, simple and efficient method of collecting the amounts due on said bonds, and that subsequent to the issuance thereof, the Legislature enacted the stay provisions of the Municipal Finance Commission Act, which so impair, diminish and destroy Appellee's right to enforce the collection of its bonds that the Appellee is without adequate remedy, in violation of the contract clause of the Constitution of the United States.

The **complaint** contains four counts. Count one, after alleging jurisdictional facts (all of which are stipulated as true, R. 111), alleges that the Municipal Finance Commission is functioning in the Borough and School District of Runnemede, New Jersey; that the Appellee obtained a judgment on defaulted bonds of the School District in the sum of $21,776.21 on December 5, 1935, in the District Court of the United States for the District of New Jersey in Cause No. L-5224 and that the necessary procedure had been followed under the pertinent provisions of the Execution Act and School Law of said State as they existed at the time the bonds were issued (printed as Appendices B and C hereto, pp. 81, 82) to cause a special tax to be levied under said Acts for the payment of said judgment, but that

the Board of Assessors and Tax Collector of the Borough, and the Camden County Tax Board, have failed and refused to comply with the provisions of said Execution Act and School Law, for the reason that the Municipal Finance Commission is functioning in the Borough and School District and had advised non-compliance, relying upon the stay of remedies provisions contained in said Article III-A of the Municipal Finance Commission Act. It was further alleged that the said stay of remedies provisions of said Act were enacted subsequent to the issuance of the bonds upon which the judgment was rendered, and that such legislation is contrary to, and in violation of, Article I of Section 10 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and that the enactment of said stay of remedies provisions had impaired, diminished and destroyed Appellee's right to enforce the obligation of the contracts contained in its bonds and judgment, leaving the Appellee without adequate remedy. The prayer for relief asked that the Municipal Finance Commission be enjoined by interlocutory and permanent injunctions against functioning in the School District, and that the aforesaid laws providing the stay of remedies be held unconstitutional and void, and that the Board of Assessors and Tax Collector be enjoined from assessing and collecting taxes without including the Appellee's judgment therein, and for general relief.

Count two reaffirms and realleges all the factual allegations contained in count one and further alleges that Appellee owns $70,000 bonds of the School District which have not yet matured and contain no provision for acceleration of principal, and that the Municipal Finance Commis-

sion Act and the operations of said Commission in the Borough and School District have cast a cloud of unenforceability upon Appellee's bonds and that the market value thereof has been greatly depreciated and impaired, and that such condition will continue so long as the Municipal Finance Commission functions in said Borough and School District. The prayer requested the Court to remove the cloud of unenforceability and prevent a multiplicity of suits upon the various installments of bonds as they became due by enjoining, permanently and by interlocutory injunction and temporary restraining order, the functioning of the Municipal Finance Commission in the School District, and general relief.

Count three realleges and reaffirms the general factual allegations contained in counts one and two and alleges facts showing that the municipality had in the past, by and with the consent of the Municipal Finance Commission, compromised past due taxes and assessments and accepted bonds in payment thereof instead of requiring payment of such past due taxes and assessments in cash, such procedure being unlawful and illegal and resulting in a preference to bondholders holding property in the Borough. The prayer of count three requests the Court to enjoin permanently and temporarily the Municipal Finance Commission from authorizing and assenting to the acceptance of any medium, other than lawful money, in payment of taxes, and general relief.

Count four, in general, realleges and reaffirms the general factual allegations contained in counts one, two and three and alleges further facts setting forth a cause of action for a declaratory judgment as to the constitutionality and validity of the stay of remedies provisions of the

Municipal Finance Commission Act under the provisions of Judicial Code, Section 274d (28 U. S. C. A., Sec. 400). The prayer called for a declaratory judgment under said section and for general relief.

The complaint was answered by the Appellants the Municipal Finance Commission and by the Appellant officials of the Borough of Runnemede and the issues were properly raised. The Court found in general (R. 90-95) in favor of the Appellee upon all the jurisdictional and underlying facts, and as to the interference of the Municipal Finance Commission in the attempt of the Appellee to obtain satisfaction of its judgment, that one of the reasons the officials failed to follow the direction of the statutes providing for the satisfaction of judgments, was that the Municipal Finance Commission was operating in the Borough and School District and had advised non-compliance. The Court also found that Appellee's evidence relating to the effect of the legislation upon the value of municipal securities was insufficient to establish a cloud of unenforceability on Appellee's bonds.

The **decree** provides substantially (R. 95-99):

As to count one of the complaint:

(1) for the issuance of an injunction against the Municipal Finance Commission restraining it from functioning in the Borough to the extent that such functioning may be inconsistent with the right of Appellee to enforce its execution, but without prejudice to powers and duties of the Municipal Finance Commission, except as to the stays contained in the Act;

(2) that the stay provisions of the Municipal Finance Commission Act are unconstitutional and void insofar as

they affect the right of the Appellee to enforce its judgment obtained and entered in the court;

(3) that no injunction shall issue restraining the collection of taxes in the Borough without including the amount of Appellee's judgment in such cases; and

(4) that the enforcement of Appellee's judgment shall be in accordance with the laws existing in the State of New Jersey at the time of the issuance and sale of the bonds in question, and that the laws applicable thereto are the Execution Act and the School Law, and that said sections were not repealed by the provisions of the Tax Act of 1918.

As to count two of the complaint:

(5) Denies the prayer of the complaint to enjoin the Municipal Finance Commission from functioning in the School District for the reason that such functioning casts a cloud of unenforceability upon the Appellee's bonds; and

(6) All other relief prayed for under this count was denied as unnecessary in view of the relief granted with respect to count one.

As to count three of the complaint:

(7) Appellants Municipal Finance Commission and Spencer, Borough Tax Collector, were enjoined from making settlement for taxes due and owing to the Borough in any medium except in accordance with the laws of the State of New Jersey.

As to count four of the complaint:

(8) In answer to the prayer for relief under the declaratory judgment act contained in this count, the court ordered, adjudged and decreed the stay provisions of the Municipal Finance Commission Act to be unconstitutional

and void insofar as they affect the right of Appellee to enforce judgments hereafter entered upon Appellee's bonds, or any portion thereof, as being contrary to Article I, Section 10, of the Constitution of the United States; and

(9) The Municipal Finance Commission was permanently enjoined and restrained from functioning in the Borough to the extent that such functioning is inconsistent with the right of Appellee to enforce, in the manner therein stated, executions to be issued upon judgments hereafter entered on bonds of the School District, without prejudice to any of the powers and duties of the Municipal Finance Commission, except as the stays contained in the Act affect the right of Appellee to enforce such judgments.

Facts:

This statement of additional important facts is supplementary to that contained in Appellants' brief.

At the trial of the cause, the testimony submitted was directed almost solely towards showing the detrimental effect of the Municipal Finance Commission Act and the operations of the Commission on the marketability of bonds of municipalities of the State of New Jersey generally, and particularly the bonds of those municipalities under the protection of the Commission. Inasmuch as the Court held that such testimony was insufficient to show a cloud of unenforceability on the bonds, and denied the relief prayed in count two of the complaint, and the Appellee has not appealed from such ruling, that testimony is only helpful in demonstrating that a controversy exists, in support of the declaratory judgment rendered herein.

This case is one of a series of cases brought by holders of bonds against municipalities under the protection of the Municipal Finance Commission. By very adroit maneuvering on the part of the Commission, it had been been impossible to obtain a clear definition of the rights of creditors in view of the Municipal Finance Commission Act, and this case was brought for the purpose of obtaining such a determination. Consequently, in order to conserve the time of the Court, and in order to avoid a repetition of testimony concerning the activities of the Municipal Finance Commission, with which all of the judges sitting in the case were more or less familiar, they all having presided at trials in similar actions, or sat in appeals therefrom, by stipulation (R. 118), there was admitted in evidence the following:

(a) The record, testimony, and exhibits submitted to the United States District Court for the District of New Jersey in an action at law, *Barker* v. *North Bergen,* L-4864;

(b) The record, testimony, and exhibits submitted to the United States District Court for the District of New Jersey in a suit in equity, *Barker* v. *North Bergen,* E-5025;

(c) The record, testimony, and exhibits submitted to the United States District Court for the District of New Jersey in mandamus proceedings, *United States* ex rel. *Christmas* v. *Asbury Park,* L-4851;

(d) The record, testimony, and exhibits submitted to the United States District Court for the District of New Jersey in mandamus proceedings, *United States* ex rel. *Woodmen of the World* v. *Runnemede,* L-5224;

(e) The record, testimony, and exhibits submitted to the United States District Court for the District of

New Jersey in mandamus proceedings, *United States* ex rel. *Norfolk & Western Rwy.* v. *Township of Chester,* L-5013;

(f) The minutes of the Municipal Finance Commission's activities in all municipalities wherein it is functioning, to wit: Asbury Park, Avalon, Brigantine, Chester, Delaware, Fort Lee, Lavallette, Manville, Mount Ephraim, North Bergen, Runnemede and South Hackensack (formerly Lodi Township);

(g) Certain financial records as to the twelve municipalities in which the Municipal Finance Commission is functioning, together with similar statements as to the municipalities of Lakewood, Moonachie, Neptune City, West New York, and Woodbridge;

(h) Statements of cash on hand in current and trust accounts and statements of certain liabilities of the seventeen above named municipalities.

Excerpts from so much of these cases as was deemed helpful in this appeal, are printed in the record on this appeal at pages 155 to 180, inclusive, and the other data referred to above appears in the record at pages 191, *et seq.* For a brief history of the aforesaid litigation, demonstrating the manner in which numerous delays and difficulties have been interposed in suits by creditors, the Court is referred to the affidavit verifying the bill of complaint in support of the application for the interlocutory injunction (R. 37 *et seq.*). In each of these cases, the Municipal Finance Commission filed petitions for leave to intervene, and proceeded to defend the municipality against the action of the creditor, asserting that, by reason of the Commission functioning in said municipalities under the Municipal Finance Commission Act, the Court should withhold judgment on defaulted bonds and interest, and subsequently opposing creditors' attempts to collect such judgments.

Appellant Darby, State Auditor and ex-officio Chairman of the Municipal Finance Commission, testified in *Barker* v. *Township of North Bergen* (R. 156) concerning the personnel and purposes of the Commission, namely, to act in an advisory and supervisory capacity to municipalities coming under its jurisdiction. In that case it was brought out by the same witness, that none of the municipalities under the protection of the Commission had paid out any money to creditors, except in connection with a refunding plan being put through, or where preferential payments had been made through the purchase of bonds with sinking fund, or other trust fund moneys, the acceptance of bonds in payment of taxes, or by plain preferential payments (R. 156, 157, 158). The record (R. 184) shows that in Runnemede $74,000 bonds were purchased with trust funds, and that the Borough had accepted $62,507.01 worth of bonds for taxes (R. 171). All these transactions were approved by the Municipal Finance Commission. This withholding of funds was done notwithstanding the fact that large sums of money were on hand in the treasuries of these municipalities (Ex. 18-e to 18-q inc., R. 199-203). In Runnemede there was $16,207.12 (Ex. 18-i, R. 200) and there would have been an additional $48,670 had the money not been used for the preferential purchase of bonds, as above stated.

Chairman Darby further testified in the *North Bergen* equity case (R. 158-161), that it was the general policy of the Municipal Finance Commission, in the municipalities in which it was functioning, to withhold all payments to bondholders from moneys in the treasury, unless such payment was made in connection with a refunding program, the reason for that policy being that it was difficult to obtain

the consent of creditors to a refunding program unless there was cash to offer as an inducement. In other words, as the Court there stated (R. 160), the Commission was "withholding these funds as a sort of club over the heads of creditors until such time as they may be forced to come in by virtue of this holding out."

In order to implement the purposes and intentions of the Commission as testified to by the Chairman, it was essential that creditors who were unwilling to accept refunding obligations, on the terms and conditions specified by the Commission, should not be able to obtain satisfaction of their claims through legal process. Consequently, the stay provisions were placed in the Municipal Finance Commission Act, and the Commission began intervening in litigation between creditors and the municipalities under its protection.

The evidence in all the aforesaid cases mentioned in the stipulation and admitted as evidence in this case, shows that the defaults, in the municipalities under the protection of the Commission, have occurred by reason of the failure of local officials to perform their statutory duties with respect to the collection of taxes. Tax sales were not regularly held, and tax liens were not regularly foreclosed. That was the case in the Borough of Runnemede, as testified to by the Commission's auditor in the mandamus action (R. 166). Instead of the prompt foreclosure of tax liens, they were allowed to accumulate for five or six years and more. The first action the Municipal Finance Commission should have taken, therefore, was to effectuate the immediate foreclosure of these properties, the sale of same, the application of the proceeds of such sales to defaulted obligations, and the prompt prosecution of the collection

of future taxes in the Borough. Instead of this effective means of helping the creditors, however, the Commission proceeded to compromise taxes and accept bonds in payment thereof, and to purchase bonds with all available funds of the municipality. These actions may have helped the municipalities but were extremely detrimental to creditors, as will be pointed out hereafter.

Appellants have printed, as Appendix A to their brief, a statement of facts in which they attempt to show that the Commission has been diligent in its supervision of this Borough and School District. These statements are taken largely from the minutes of the Municipal Finance Commission and are, therefore, self-serving statements and should be so considered by the Court in determining whether or not, as a matter of fact, the Commission has been lax and dilatory in managing the affairs of the Borough. However, Appellee does not complain of those actions of the Commission which have had for their purpose the conservation of the assets of the Borough, nor which have tended to increase tax collections in the Borough. Appellee's only complaint is that such actions have not resulted in any payments to creditors, and that so long as the Commission continues its present method of operation, Appellee can expect no such payments. The net result of the Commission's efforts has been merely to insure the operation of the Borough and School District, so as to continue to supply to the inhabitants thereof all the services they desire, on the scale they desire them, and at the price they are willing to pay for them.

Excerpts from the minutes of the meetings of the Municipal Finance Commission, in connection with its operation in the Borough of Runnemede, are printed in the record

on pages 203-328, inclusive. In printing these excerpts unfortunately the order of the meetings was reversed so that the minutes of the latest meetings appear first and the first meetings last. A cursory reading of these minutes indicates the difficulties which the Municipal Finance Commission encountered in forcing a tax sale in this municipality, and also indicates that most of the Commission's time was taken up in approving the usual routine affairs in connection with the ordinary expenditures of the municipality, and in approving compromises of delinquent taxes. These routine matters made up the bulk of the considerations of the Commission, from the date it began to function in the Borough, May 18, 1934 (R. 324), until approximately January 1, 1936, when Appellee first began to take legal action with respect to the enforcement of its judgment. These excerpts do not disclose that any action was taken by the Commission looking toward payments on account of, or the refunding of, the bonded indebtedness of the Borough and the School District, until April 3, 1936 (the day of the hearing on the Appellee's mandamus case, (R. 161)), when there was filed with the Commission a proposed plan of refinancing (R. 212). This plan was tentatively approved at the meeting of the Commission on April 17th (R. 212). This is the same plan which was presented in opposition to the Appellee's proceedings for a writ of mandamus at the hearing thereon, when the Appellee was told by Mr. Gary, Auditor for the Municipal Finance Commission, that it provided the only means of any bondholder obtaining any payment (R. 166).

Specific facts and evidence pertinent to the various points of legal argument will be hereafter discussed in connection with each point.

ARGUMENT.

Summary.

Appellee will reply to the points made in Appellants' brief in the order therein appearing. Under Point I will be argued the various phases of the question of the constitutionality of the Municipal Finance Commission Act; under Point II will be discussed the propriety of the Court's rulings setting forth the statutes governing Appellees' remedies; under Point III will be discussed the propriety of the injunction restraining the Municipal Finance Commission and the Tax Collector from authorizing the acceptance of bonds in payment of taxes, and under Point IV will be discussed the jurisdiction of the three-judge court and the right of Appellee to relief in such court.

Italics used are ours unless otherwise noted.

POINT I.

The District Court did not err in enjoining the Municipal Finance Commission from functioning in the Borough and School District insofar as such functioning affects the Appellee in the enforcement of its judgment, or in declaring the stay provisions of the Municipal Finance Commission Act unconstitutional.

In order to determine the question whether the stay of remedies provisions of the Municipal Finance Commission Act actually impairs the obligation of contracts in contravention of Article I, Section 10, of the Constitution of the United States, it is first necessary to determine the rights of Appellee to enforce its judgment against the School

District of the Borough, under the laws in existence at the time the bonds, which are the basis for that judgment, were issued. These laws were Section 35 of the Execution Act (2 Compiled Statutes of N. J. (1910), p. 2256), Section 237 of the School Law (4 Compiled Statutes of N. J. (1910), p. 4804), and Section 505 of the Tax Act (P. L. N. J. 1918; c. 238, p. 865), printed as Appendices B, C and D hereto (pp. 81, 82, 83).

The Execution Act provides, substantially, that whenever an execution issued against a school district is returned *nulla bona*, the officer authorized to execute such process shall serve a copy of the same upon the assessor or assessors of the township in which said school district is situate, and also upon the collector of such township, and, upon receipt of such execution, the assessor shall add to the next regular assessment of school taxes in such school district the amount due on said execution, with interest to the time when the same shall be paid to the officer serving such process; that this tax shall be assessed and collected, at the same time and in the same manner and under the same restrictions, conditions and regulations as other taxes for school purposes are required to be assessed and collected, and that the amount thereof, when collected, shall be a separate fund and shall be paid over, by the collector of the township in which such school district is situated, to the officer serving the process. Section 237 of the School Law is identical with the Execution Act, except that the words "taxing district" are used in place of the word "township". The Tax Act provides for service of a copy of the execution on the county tax board and provides that that body shall add the amount thereof to the amount to be raised by taxation in the taxing district, if the taxing dis-

trict has not already added it, and further provides that the amount of the execution shall be paid to the officer serving the process, on or before the 5th day of June. This date it should be noted is prior to any date fixed by the statute for the payment by the collector of the proceeds of taxes to the various taxing bodies. Consequently, the Execution Act and School Law provide the mechanics and the Tax Act makes definite the date of payment over by the collector.

The net result of these provisions, which became a part of the contract entered into when the bonds were issued, is that in the event of a default on said bonds and judgment being rendered thereon, and execution having been returned unsatisfied, a simple procedure was provided whereby the judgment creditor would be entitled to a special tax for his judgment, the proceeds of which, when collected, would be applicable solely to the payment thereof. The rights of the judgment creditor, under these Acts, were very valuable, as they provided a prompt, speedy and efficient remedy in the event of a default in the payment of municipal obligations. It was held to be a valuable right in *Gabler* v. *Elizabeth*, 42 N. J. L. 79 (Sup. Ct. 1880), where it was stated that the remedies under the Execution Act "imparted substance and life to what was before * * * little better than the mere shadow of a remedy."

In the event the taxing officials ignored their mandatory duty to levy taxes, pursuant to said Acts, the judgment creditor was entitled to a writ of mandamus *as a matter of right* to compel said officials to comply with the statutes. Both the State and Federal courts in New Jersey have so held in many decisions.

Lyon v. *City of Elizabeth*, 43 N. J. L. 158 (Sup. Ct. 1881);

Munday v. *Rahway*, 43 N. J. L. 338 (Sup. Ct. 1881), *affirmed* 44 N. J. L. 395 (E. & A. 1882);
Hourigan v. *Township of North Bergen*, 113 N. J. L. 143 (E. & A. 1934);
Goelet v. *Elizabeth*, Fed. Case No. 5502 (D. C. N. J. 1879);
Moran v. *City of Elizabeth*, 9 Fed. 72 (C. C. D. N. J. 1881);
U. S. v. *City of Elizabeth*, 24 Fed. 851 (C. C. D. N. J. 1885);
President ex rel. *Moran* v. *City of Elizabeth*, 40 Fed. 799 (C. C. D. N. J. 1889).

The reason for these decisions is that the writ of mandamus in such cases is substituted for and performs the functions of proceedings under an execution in the case of a judgment against an individual, or private corporation. The Court of Errors and Appeals of the State of New Jersey in *Hourigan* v. *Township of North Bergen, supra,* said (113 N. J. L. at p. 146):

> "That the granting of a writ of *mandamus*, in a case such as this, will work confusion in the financial affairs of the municipality, does not justify the denial of the application. *It is not a discretionary matter. Mandamus* is the only remedy of the creditor for the enforcement of his contract. This is a well-established doctrine. *Lyon* v. *City of Elizabeth*, 43 N. J. Law 158; *Piscataway Township* v. *First National Bank of Dunellen*, 111 *id.* 412."

These decisions are in harmony with many rulings of this Court as is demonstrated by the following decisions, most of which involve the collection of judgments against public bodies:

Kendall v. *U. S.*, 37 U. S. (12 Pet.) 524 (1838);
Kendall v. *Stokes*, 44 U. S. (3 How.) 87 (1845) (companion case to *Kendall* v. *U. S.*, *supra*);
Kentucky v. *Dennison*, 65 U. S. (24 How.) 66 (1860);
Knox County v. *Aspinwall*, 65 U. S. (24 How.) 376 (1860);
U. S. v. *New Orleans*, 98 U. S. 381 (1878);
Nelson v. *St. Martin's Parish*, 111 U. S. 716 (1883).

That was the state of the law when the Municipal Finance Commission Act was passed in 1931 (P. L. N. J. 1931, c. 340). In 1932 Article III-A, containing the stay provisions, was added by Chapter 236 of the Laws of that year (*infra*, p. 75, *et seq.*). At the time Article III-A was adopted Section 406 of the Act (P. L. N. J. 1931, c. 340) expressly provided "* * * that nothing contained in this Act shall be construed to impair in any way the obligation of any contract or existing remedies by any creditor of any municipality." The law at that time, therefore, did not deprive or attempt to deprive any creditor of any remedy which he might have had to enforce his obligations. Section 406 was amended by Chapter 330 of the Laws of 1933 so as to eliminate the proviso in Section 406 that the Act should not be construed to impair the obligation of any contract or existing remedies. Thus the Legislature clearly indicated its intention to violate contractual obligations by depriving creditors of existing remedies and by preventing the courts from construing the Act as not being intended to apply to pre-existing contracts. It indicates a deliberate violation of contractual rights.

Appellants ignore in their brief this long line of decisions and state (p. 23) that a Federal Court in an action for a writ of mandamus has discretionary power to withhold the writ, relying upon the decision of the Circuit Court of Appeals for the Third Circuit in *City of Asbury Park* v. *Christmas*, 78 F. 2d 1003 (1935), which opinion is quoted in full in their brief. It is indeed difficult to understand why that case was decided as it was, as it is contrary to the rule in the foregoing cases, and contrary to the decisions of other Circuit Courts of Appeals. Since Appellants have gone beyond the printed transcript of the record in discussing this case, it is necessary that we do likewise in order to explain the circumstances that led to that decision.

Relators therein had obtained a judgment against the City of Asbury Park, on February 21, 1935, in the District Court for New Jersey. Execution was issued March 4, 1935, and returned *nulla bona*. On March 6, 1935, relators filed a petition for a writ of mandamus to compel the officials of Asbury Park to levy and assess a tax for the amount due on the judgment and execution, and obtained a rule to show cause returnable on March 8, 1935 (*U. S.* ex rel. *Christmas* v. *City of Asbury Park*, U. S. D. C. N. J. Cause No. L-4851; see Stipulation of Facts, R. 118, par. 21(c)). On January 18, 1935, certain creditors of the City of Asbury Park had filed a petition in the New Jersey Supreme Court to place the city under the protection of the Municipal Finance Commission, and that proceeding was adjourned from day to day to see what would happen in the Federal court case. On March 7, 1935, the day before the hearing on the rule to show cause in the mandamus case, the municipality was placed under the protection of the

Commission. On March 15th, the order for the peremptory writ was issued. An appeal was immediately taken to the Circuit Court of Appeals of the Third Circuit, and, no attempt having been made to comply with the writ in the meantime, on June 13, 1935, the officials of the city were adjudged in contempt. This ruling was also appealed from. The record in the *Asbury Park* case will show that little or no evidence was presented, and no oral testimony was taken regarding the financial condition of the city. A new administration had just come into power in the city after a recall election. The Municipal Finance Commission had been functioning in Asbury Park for only two or three months when the case was submitted on appeal to the Circuit Court of Appeals, and there had been no opportunity for the Circuit Court of Appeals to study the effect of the supervision of the financial affairs of the city by the Municipal Finance Commission, for the Commission had been largely engaged during that period in fighting the suit brought by creditors. There was no way to know what the Commission's performance would be with respect to treatment of, and payments to, bondholders.

This assumption is borne out by the fact that the Court failed to determine any of the several important questions of law that were thoroughly discussed by the briefs of the contending parties. Under the circumstances the Circuit Court of Appeals apparently felt that the Commission should have some time to study the Asbury Park problem, and that since the creditors had waited for some years before bringing the action, a short additional delay would not seriously impair their rights, particularly since no practical benefit in that year would result from sustaining the writ, in view of the fact that the tax levy for that year had

already been made. The Commission contended that equal provision for all creditors had been made therein, the tax bills were out, many taxpayers had paid all or some part of their taxes, and to sustain the writ would result in considerable confusion, without obtaining any money for relators.

We see no great and lasting teaching coming from the *Asbury Park* decision which could in any way be used to change or impair or otherwise limit the rights of judgment creditors of municipalities of the State of New Jersey. The case cited as the precedent for the decision was not in point. The language of the opinion was vague and inept. For instance, the Court could not have meant "equal treatment" literally, for the rights of the various classes of municipal bondholders are not the same. Some bondholders hold general obligation bonds of the municipality, some bondholders hold bonds which are additionally secured by special assessments for local improvements, some bondholders hold obligations for which certain taxes are pledged ahead of the claims of other bondholders on such taxes, and holders of school district bonds are given special preference and security not afforded to holders of bonds of the municipality. It must also be obvious that the Court does not desire that its opinion in the *Asbury Park* case be interpreted as holding that a writ of mandamus is a writ of discretion in all cases, for such a decision would be in conflict with prior express decisions of the Supreme Court of the United States, and the interpretation of the New Jersey statutes by the Court of Errors and Appeals of that state. It is significant that, although the decision has been in the books since 1935, we are unable to find it followed by any other Circuit Court of Appeals.

There is undoubtedly discretion in the Federal Courts over the amount to be raised annually for the purpose of paying a judgment during the life of the writ, but we submit that the Circuit Court of Appeals for the Fifth Circuit has correctly stated the rights of judgment creditors, such as Appellee here, in *U. S.* ex rel. *Metzger* vs. *City of Vero Beach*, 90 F. 2d 70 (1937). There the lower Court had refused to provide for a levy for the full amount of the judgment and had refused to give peremptory relief to the judgment creditor. The District Court intimated, however, its willingness to order a special tax for a portion of the judgment for the current year, retaining jurisdiction with reference to future levies. This procedure was condemned by the Circuit Court of Appeals of the Fifth Circuit and the logic of the opinion on this point is irrefutable (p. 72):

> "The hardship and uncertainty upon a suitor of having to litigate annually for a fractional part of the amount due is apparent. *There should be an end of litigation.* The relator is entitled to equal and exact justice speedily administered. Such should be awarded in a single and entire judgment directing the issuance of a peremptory writ. Whether the entire amount should be raised by a single tax or divided into fractions thereof and raised by two or more levies spread over a reasonable number of years is a matter resting in the sound discretion of the court. United States *v.* City of Key West (C. C. A.), 78 F. 88; East St. Louis *v.* Amy, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798.
>
> As to the manner in which the discretion is to be exercised, it is well to bear in mind the memorable language of the Chief Justice in Osborn *v.* Bank, 9 Wheat. 738, 866, 6 L. Ed. 204: 'Judicial power, as contradistinguished from the power of the laws, has

no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.'

In *State ex rel. Klemm* v. *Baskin*, 111 Fla. 667, 150 So. 517, 518, the court said: 'Whatever discretion, as a general rule, may be vested in the courts to withhold peremptory writs of mandamus as a matter of discretion in certain cases, such discretion can never be exercised by any court of this state to the extent of impairing the obligations of valid contracts, in violation of the state and Federal Constitutions, both of which guarantee a remedy in the courts to all who have lawful contractual obligations to enforce against those who have breached a statutory duty, the performance of which was promised in the terms of an express agreement, the rights growing out of which are enforceable as a matter of legal right, by mandamus, as is the case with public securities.'

In State *v.* Werra Aluminum Foundry Co., 173 Wis. 651, 182 N. W. 354, 355, 22 A. L. R. 1, the court said: 'Judicial discretion should not be exercised to withhold the writ of mandamus to enforce a clear right conferred by statute when no other remedy is available to secure such right. To do so amounts to judicial assumption of legislative prerogatives, emasculates or annuls legislative enactments, and savors of judicial government.'

In *State* v. *Posey*, 17 La. Ann. 252, 87 Am. Dec. 525, the Court said:

'The judiciary is not, by the constitution, invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.

'The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice.'

See, also, 18 R. C. L. 137, Sec. 52; 38 C. J. 549, Sec. 18; *Gay* v. *Torrance,* 145 Cal. 144, 78 P. 540; *Stinson* v. *Godbe,* 48 Utah 444, 160 P. 280; *Town of Columbus* v. *Barringer* (C. C. A.), 85 F. (2d) 908; *Gowdy* v. *Board of Education,* 89 N. J. Law 137, 98 A. 12; *Rees* v. *Watertown,* 19 Wall. 107, 22 L. Ed. 72; *City of Galena* v. *Amy,* 5 Wall. 705, 18 L. Ed. 560; *Benbow* v. *Iowa City,* 7 Wall. 313, 19 L. Ed. 79; *City of Little Rock* v. *United States* (C. C. A.), 103 F. 418; *City of Sarasota* v. *State* (Fla.), 172 So. 728; Id. (Fla.), 172 So. 732; *Sholtz* v. *United States ex rel. Ben Hur Life Ass'n* (C. C. A.), 82 F. (2d) 780.

The judgment of the district court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.''

The cases cited by Appellants as being to the same effect as the *Asbury Park* case merely hold that the federal courts have power to fix the number of years that the judgment shall be paid in, and do not refer to the question of whether such writ shall issue.

In contrast to the plain, speedy and efficient remedy existing on the bonds at the time they were issued, the stay provisions of the Municipal Finance Commission Act place insuperable barriers to any recovery by a judgment creditor. Under the aforesaid stay provisions, having reduced his bonds to judgment, the creditor is barred from

enforcing same until he first applies to the Supreme Court of New Jersey or to a Justice thereof, after notice to the Municipal Finance Commission, for permission to institute a suit to mandamus the levy of taxes by the municipality. The Commission may defend the municipality in such an application and undoubtedly would defend if the municipality was levying taxes in accordance with the suggestions of the Commission. Assuming, however, that the judgment creditor is successful in his application over the protest of the Municipal Finance Commission, and that he finally obtains an order authorizing him to bring a suit for writ of mandamus, he finds that he may not bring the suit for his own benefit, but that he must bring it for the benefit of all creditors, whether they hold matured or unmatured obligations, and in that proceeding all other creditors may intervene and assert their claim, and the Court may require the judgment creditor to give such notice and bring in such other creditors, in such manner as the Court shall determine. (Section 352, M. F. C. Act; Appendix A, *infra*, p. 75). Each creditor must prove his claim, which might require jury trials in many cases, as many of the claims would be on open accounts, claims for damages, etc., which would require adjudication. When all the claims are adjudicated and a tax is finally ordered to be levied, the avails thereof are applied to the payment of the state tax, county tax, School District tax and the municipal operating expenses, leaving practically nothing for the creditors. The judgment creditor who has borne the expense of the litigation would receive his *pro rata* share thereof, which, unless he is the holder of a very large percentage of the indebtedness of the municipality, would undoubtedly be a mere fraction of his legal expenses. The following year,

and each year thereafter, the creditor would have the right to repeat the performance until his experience taught him the futility of attempting to enforce his obligation, and he would thereupon be willing to accept any settlement the municipality and Commission offered, regardless of the fairness of such settlement.

In the meantime, the municipality might compromise the delinquent taxes, which funds would, under Section 212 of the Act, as amended by Chapter 330 of the Laws of 1933 (Appellants' Brief, p. 102), be placed in the reserve fund created by Section 211 of the Act (Appellants' Brief, p. 101) for the payment of the principal and interest of the municipality's bonds. The joker in Section 211 is that no money may be withdrawn from that fund for "investment or otherwise" without the approval of the Commission. The moneys in that fund could be used for "investment" in the bonds of the municipality at depressed prices caused by the failure of the municipality and the Commission to make any payments on account of the defaulted principal and interest thereof.

Appellee maintains that these stay provisions of the Municipal Finance Commission Act are unconstitutional and void because:

(a) they infringe upon and impair the jurisdiction of the federal court;

(b) they impair the obligation of the contracts between the debtor and the bondholder contrary to the contract clause of Article I, Section 10 of the Constitution of the United States;

(c) an adequate and efficacious remedy has not been substituted for that withdrawn, and further that

(d) the Municipal Finance Commission Act cannot be sustained as emergency legislation, and

(e) the Municipal Finance Commission Act cannot be sustained as an insolvency act.

These contentions will be discussed in the above order, and in so doing we will controvert applicable arguments contained in the brief of appellants and we will demonstrate that the Municipal Finance Commission Act is but a repetition of numerous attempts by state legislatures to forestall the collection of defaulted municipal bonds, all of which attempts have heretofore been held unconstitutional by the federal courts.

(a) The Municipal Finance Commission Act infringes upon and impairs the jurisdiction of the Federal courts.

Cutting away the camouflaged verbiage from Section 17 of Chapter 258, P. L. N. J. 1935, relating to school districts, this section reads (*infra*, p. 78):

> "No * * * mandamus * * * shall be brought against such school district * * *, except * * * the Supreme Court or a Justice thereof * * * may authorize one or more creditors * * * to bring * * * an action * * * therefor in the Supreme Court, which shall be brought for the benefit of * * * all * * * creditors * * *."

When these cases between creditors and municipalities under the protection of the Commission first arose, the Municipal Finance Commission contended that it was beyond the power of the federal court to render a judgment on defaulted bonds of the municipality under the protection of the Commission. The Circuit Court of Appeals of the Third Circuit, however, held in *Delaware Township* v. *Central-Penn National Bank*, 79 F. 2d 255 (C. C. A. 3rd,

1935), that the Act does not expressly bar actions for judgment on defaulted municipal bonds in the federal court. In that case the Court recognized the restraint which the Act attempted to place upon federal courts by requiring the judgment creditor in the federal court to go to the Supreme Court for its enforcement, saying (at p. 256):

> "The Municipal Finance Act does not forbid a plaintiff to obtain judgment, but provides that the Supreme Court shall decide whether or not execution shall issue."

The above quoted reference to the Supreme Court can only mean the Supreme Court of New Jersey, for the New Jersey Legislature could not confer such extraordinary jurisdiction upon the United States Supreme Court. Counsel for the Commission now concede that the Act does not impair the power of the federal court to issue a writ of mandamus for the enforcement of a judgment rendered by that court, but counsel's belated concession cannot dispose of the fact that there was a controversy before the trial court, which it was justified in deciding and in awarding appropriate relief.

(b) The contract between the School District and Appellee as a bondholder is impaired by the stay provisions of the Municipal Finance Commission Act, contrary to the contract clause of the Constitution of the United States.

The attempted substitution of remedies under the stay provisions of the Municipal Finance Commission Act presents two main questions. First, does the withdrawal of remedies for the enforcement of judgments upon the bonds of the School District impair the obligation of contracts,

and second, has an adequate and efficacious remedy been substituted for the remedies so withdrawn?

Concerning the first question, the phrase "obligation of contracts" has been determined by this Court in innumerable cases to mean the remedies for the enforcement of such contracts as well as the terms of the contract itself. The leading case so far as municipal bonds is concerned is *Von Hoffman* v. *City of Quincy*, 71 U. S. (4 Wall.) 535 (1866). This Court there held that the statutes in effect at the date the bonds were issued were a part of the contract, saying (p. 550):

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

In *Walker* v. *Whitehead*, 83 U. S. (16 Wall.) 314 (1872), this Court said that these propositions were axiomatic (p. 317):

> "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement;
>
> Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment; * * *"

The inhibition upon the courts to issue a writ of mandamus as provided in the Municipal Finance Commission Act might well have been taken from a statute of Louisiana of 1876, held unconstitutional in *Wolff* v. *New Orleans,* 103 U. S. 358 (1880), *Louisiana* v. *Pilsbury,* 105 U. S. 278 (1881), and *Hubert* v. *Mayor, etc.,* 215 U. S. 170 (1909).

Section 7 of the 1876 Act, set forth in 105 U. S. at p. 283, read in part:

> "* * * and it shall be hereafter incompetent for any court to mandamus the officers of said city to levy and collect any interest tax other than that provided in this act [which was for premium bonds, so-called, which plaintiff refused to accept], or in case of such mandamus, by a receiver or otherwise, to direct the levy and collection of any such tax."

"The act," said the Court in *Wolff* v. *New Orleans,* 103 U. S., at p. 363, "* * * cuts him [the bondholder] off absolutely, unless he will accept the conditions of the proposed plan."

The Court further held (p. 364):

> "* * * It is plain that if the provisions of this act can be sustained as a valid exercise of legislative power, the judgment of the relator is practically annulled or rendered so uncertain of payment as to be of little value."

These cases unequivocally hold that municipal bonds are contracts within the meaning and protection of Article I, Section 10 of the Constitution of the United States and that no state legislature can enact a valid law which takes

from holders of bonds then outstanding the right to compel their payment by mandamus.

The authorities herein cited and quoted might be multiplied many times over, and these authorities are generally reviewed by Mr. Chief Justice Hughes, in *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398 (1934).

Edwards v. *Kearzey,* 96 U. S. 595 (1877), is also an interesting and instructive opinion concerning the effect of statutory enactments upon pre-existing contracts, in the light of the contract clause of the Federal Constitution, and the intention of the framers of the Constitution as evidenced by the condition of the Nation at the time of its adoption.

Under the aforesaid decisions, therefore, the stay provisions of the Municipal Finance Commission Act of New Jersey are unconstitutional unless there is substituted a remedy which is equally efficacious with the remedy withdrawn. This brings us to the second phase of this question mentioned above, namely the efficacy of the remedy substituted by the act which we will discuss in the following subdivision.

(c) Bondholders have not been given an adequate and efficacious remedy in substitution for that withdrawn.

We have heretofore analyzed the remedy afforded under the stay provisions of the Municipal Finance Commission Act (*supra,* pp. 25-27). Proof of our analysis of the lack of efficacy of this remedy is found in a recent decision of the Supreme Court of the State of New Jersey in a case involving the default of the Borough of Fort Lee, entitled *State* ex rel. *Phelps et al.* v. *The Borough of Fort Lee et al.* (1938) (unreported, decided July 26, 1938, printed as Appendix E,

infra, p. 84). In that case, certain resident holders of defaulted bonds of the Borough of Fort Lee, being foreclosed from relief under the Execution Act by the decision of the Court of Errors and Appeals in the case of *Hourigan* v. *Township of North Bergen*, 113 N. J. L. 143 (1934), *supra*, applied under Section 352 of the Municipal Finance Commission Act (*infra*, p. 75) for an omnibus writ of mandamus for the benefit of themselves and all other creditors. The amount to be levied for debt service in the year 1936 was agreed upon between the Borough, the Municipal Finance Commission, and the moving creditors. The creditors received no payments pursuant to that writ. In 1937 the proceedings were reopened and again upon consent of all parties an amount was fixed to be included for debt service in the 1937 writ. Thereafter the creditors brought contempt proceedings under the 1936 writ because they had received no money thereunder. The Borough and Municipal Finance Commission filed returns to the 1936 and 1937 writs showing that though the levies for debt service pursuant to the direction of the writs were duly made, the proceeds of the collection of the taxes had been almost entirely dissipated in paying the municipality's portion of state and county taxes, and in paying the school and borough operating expenses and that there was practically nothing left for creditors. The creditors moved to quash the returns, but the Supreme Court upheld the action of the borough and the Municipal Finance Commission, and refused to do so. We quote from that opinion as follows (*infra*, p. 84):

> "Relators, bondholders and creditors of the defendant Borough of Fort Lee, were awarded a writ of mandamus directing the Borough to levy, assess and collect by taxation for the year 1936 the sum of

$132,000 for debt service and to pay the same ratably to all creditors of the municipality. A further peremptory writ of mandamus directed that the sum of $156,560 be assessed and levied for the year 1937 for the same purpose. Defendants, the Municipal Finance Commission, and the Borough and its officers, have filed returns which state that the Borough has assessed and levied the taxes as directed and has collected on account of the 1936 levy the sum of $40,998.11, and has collected no part of the 1937 levy.

The situation appears to be that the defendants have first paid state, and county taxes and the expense of operating the municipal government out of the tax revenues and have then allocated sums to debt service from remaining moneys. We deem this action to be proper in the circumstances. State and county taxes are clearly a prior lien upon tax collections. Booth *v.* Parnell, 12 N. J. Misc. Rep. 413. It is likewise of great importance that the municipality continue to function. 'The safety and health of the citizen are of prime importance and neither can be endangered because a creditor wants his due.' Piscataway Township *v.* First National Bank of Dunellen, 111 N. J. L. 412. The difficulty in making collections of taxes levied is well known and is a matter of which the court will take judicial notice."

The creditors, therefore, instead of obtaining a special tax pursuant to their writ of mandamus which, when collected, was to be paid over to the officer serving the writ for the purpose of paying the amount due on the indebtedness for which the tax was levied, found themselves with a fifth lien on the general taxes of the municipality, a lien which would be satisfied when, as and if the delinquent taxes were collected, and with full authority in the Borough and Municipal Finance Commission to compromise those

delinquent taxes in such a manner that the creditors would never receive one cent as a result of the Court's process.

Had the creditors in that case been able to proceed under the Execution Act, they would have had a special tax for the payment of their obligations, and their obligations would have been the only charge against that tax, for the statute directs that taxes levied pursuant to the Execution Act, shall be collected and paid over by the Collector to the official serving the execution. The money received as a result of such tax never gets into the borough treasury and never becomes subject to any claims on the general tax revenues by the State, the County or the municipality (*Gabler* v. *Elizabeth*, 42 N. J. L. 79 (Sup. Ct. 1880), *supra*). This practical example of the application of the remedy provided by the Municipal Finance Commission Act proves, beyond a shadow of doubt, that it contains mere form and not substance.

The legislation embodied in the Municipal Finance Commission Act is not new in principle in New Jersey. In the 1870's several municipalities in New Jersey were in default. At that time the Legislature attempted to take away the remedies, afforded by the Execution Act, by limiting the power of the courts to issue writs of mandamus thereunder against municipalities. This legislation was declared unconstitutional in *Munday* v. *Rahway*, 43 N. J. L. 338 (Sup. Ct. 1881), *affirmed* 44 N. J. L. 395 (E. & A. 1882). Because of the similarity of the legislation under consideration in that case and that now under consideration by this Court, we quote from the opinions.

In the lower court (Sup. Ct.) Justices Reed, Dixon and Parker held that, in the case of the enforcement of a judgment against the municipality, a writ of mandamus com-

pelling a tax levy issues as a *matter of right*. After reaching that conclusion, the court went on to say (43 N. J. L. at p. 343):

> "It remains to consider whether the act of 1880, if enforced, would deprive him of that remedy.
>
> This statute requires the court to ascertain—1: the total indebtedness of the municipal corporation, the time when payable and the rate of interest payable thereon; 2: the real value for purposes of taxation of the taxable property within such corporation; 3: the amount required to be raised within such corporation for necessary expenses for municipal and other purposes during the current year; and to determine, 4: the highest rate of taxation capable of being imposed on such corporation without injury to the interests of the creditors of the corporation whose claims are not yet due. Then the *mandamus* must direct the raising of no more than the highest rate so determined will realize; and the sum so raised is to be brought into court and distributed *pro rata* among the relator and such other judgment creditors of the corporation as shall apply and make proof of their judgments. This process is to be repeated annually until the claims so proved are satisfied.
>
> It is impossible to give effect to this legislation consistently with the relator's former rights. Its central feature is the protection of the interests of creditors whose claims are not yet due. Before its passage, the court, on the application of the relator, would have considered only the amount of his judgment, and would have commanded that to be raised, regardless of outstanding debts. In City of Galena *v.* Amy, 5 Wall. 705, an effort was made to restrain the court from issuing a *mandamus* for the levy of a tax to satisfy a judgment, because of the diminished

revenues of the city and the disproportionate magnitude of its debt. But the court declared: 'We can give no weight to considerations of this character when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor and our duty to enforce them.' Such was the language of the Supreme Court of the United States concerning a suitor who had no rights in his remedy save as they inhered in the obligation of his contract. With less hesitation, if there could be any hesitation in either case, would it be applicable in a court where the specific remedy is as inviolable as the contract itself. But, according to this statute, these considerations thus ignored are to be held paramount to the relator's demands. He who before was, among creditors, preferred in right because first in time, must now be subordinated to those whose unripened claims should naturally be postponed to his debt. Thus the act would strip him of his priority, and attempts what, in Martin *v.* Somerville Water Power, 3 Wall., Jr., 206, was decided to be beyond legislative power. It is as if the legislature enacted that no execution should issue to enforce a pre-existing judgment to the prejudice of the interests of creditors whose claims were not yet due. Certainly no one would contend that such a law could be valid; nor would it be saved from invalidity because it substituted for the absolute right to execution a conditional and less advantageous remedy. A law, to be forbidden, need not deprive the party of *all* remedy; it is enough if it take away *any* remedy to which he was entitled. And by the term 'remedy' is here meant, not the form, nor perhaps the *forum* (Newark Savings Ins. *v.* Forman, 6 Stew. 436), in which the creditor is to seek redress, but the substance of his right to resort to the person or any property of his debtor for satisfaction. Rader *v.* Southeasterly Road District, 7 Vroom 273.

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> Again, it is urged that the writ of *mandamus* is a prerogative writ, which, without this statute, might be issued or withheld in our discretion, and consequently may now properly be denied, except on conditions which will meet the provisions of the act. But such was not the range of our discretion in the class of cases for which the writ is now invoked. The right of judgment creditors of municipal bodies to this writ was about as clearly defined as is that of any suitor to any writ which does not issue of course. The writ had become substantially a private remedy in these cases. The court was bound to allow it whenever the proper facts were shown, and those facts were not such as this law contemplates. If the legislature can control the discretion of the court as to the necessary facts, then it can deprive the party of his remedy; if the court yields to an attempt at such control, the same result is equally accomplished.
>
> We are constrained to declare this act unconstitutional."

The Court of Errors and Appeals in affirming this ruling said (44 N. J. L. at p. 414):

> "It thus appears that at the point of time at which the defendant in error became the creditor of the city, his remedies, in default of payment of his debt, were these: first, seizure under execution on leviable property belonging to the city; second, service of a copy of his execution on the collector of the city, and payment out of the first corporate moneys coming to his hands; third, in case the city council refused to impose a tax in order to raise money to pay the judgment, an application to the Supreme Court for a mandamus."

(This is precisely the remedy afforded Appellee by the New Jersey law when its bonds were issued.)

Of the terms of the subsequently enacted statutes there under consideration providing that the Court should exercise discretion in granting the writ and that its issuance and the proportion of the proceeds thereof should depend upon other creditors, the Court said (44 N. J. L. at p. 415):

> "Assuming for the moment, for the purpose of exposition, that the authority to impose taxes in order to pay the public debts of the corporation, as it was lodged in the common council when these bonds were issued, was irrepealable, so far as related to past debts; that the defendant, as a creditor, had the legal right to require, by the means of a mandamus, such right of taxation to be put into effect in his favor, there would seem to be no reasonable ground for a doubt that this law of 1880, just referred to, is an invasion of the constitutional rights of the bondholder. Viewing the matter from the standpoint of the assumptions just stated, it would obviously follow that having originally a complete and highly effective remedy, the creditor has been turned over to a remedy utterly inadequate and altogether precarious; for, instead of a right to a judicial order upon the municipal authorities to raise, by taxation, the amount of the moneys due him, he is, by this later legislation, enforced to accept, from year to year it may be, a quota of such sum as a judicial tribunal may, in its discretion, declare can be realized from taxation without injury to the interests of creditors whose debts have not matured. The substitution of such a means of redress as this latter one for the assumed right of the defendant to a mandamus enjoining the imposition of a special tax in his favor, would be so clear an invasion of his constitutional prerogative, that, to my mind, the subject will admit of no argument. Such a result will be assumed as a self-evident proposition; and, conse-

quently, the only questions that are debatable are, whether the municipal franchise to tax, and the right of a creditor to a *mandamus* to compel its exercise, was, in a constitutional point of view, beyond the sphere of subsequent legislation."

The remainder of the opinion is devoted to a discussion of whether a writ of mandamus to enforce a judgment is a writ of right or a writ of discretion. The Court held it to be a writ of right on the authority of *Galena* v. *Amy*, 72 U. S. 705 (1866), and *Wolff* v. *New Orleans*, 103 U. S. 358 (1880).

The Supreme Court of Florida in *State* ex rel. *Buckwalter et al.* v. *City of Lakeland*, 112 Fla. 200 (1933), held that where a bondholder had a right to a writ of mandamus to compel full payment out of a fund on hand, a statute passed subsequent to the issuance of his bond limiting his right to a writ for only his *pro rata* share of the fund was unconstitutional.

(d) The Municipal Finance Commission Act cannot be sustained as emergency legislation.

Appellants advance the theory that the Municipal Finance Commission Act and the stay provisions therein contained are constitutional on the grounds of emergency, and they cite in support of this contention, the decision of the Court of Errors and Appeals of the State of New Jersey in the case of *Hourigan* v. *Township of North Bergen*, 113 N. J. L. 143 (1934). This was a peculiar decision. The Court consisted of thirteen members. Of this number, six reached the conclusion that the Act was unconstitutional; six reached the conclusion that the Act was constitutional as emergency legislation, relying upon the decision of this

Court in the Minnesota moratorium case, *Home Building and Loan Association* vs. *Blaisdell*, 290 U. S. 398 (1934). The thirteenth judge concurred in the result of the six judges holding the act constitutional, but found that there was nothing in the act limiting its operation to the duration of the existing public emergency. He placed his concurrence on the ground that "the statute does not take away the remedy, but affords the creditor an ample remedy," and expressly stated that it was not necessary in reaching his conclusion to determine whether or not the legislature may deprive the Supreme Court of its power to issue a writ of mandamus (concurring opinion, 113 N. J. L. at p. 152). Thus we have a situation where, although the act is held constitutional, a majority of the court has neither determined that it is valid emergency legislation, nor that it is valid because it substitutes an adequate remedy for the remedy withdrawn. The Appellants, in their brief (pp. 40, 41), admit the interpretation of the case as above outlined, but, by some clairvoyant power, they assert that the thirteenth judge was actually setting forth the views of the six judges who sustained the Act. Appellee emphatically disagrees with that assertion, and is equally certain that the six judges who sustained the constitutionality of the Act on emergency grounds were in error in their interpretation of the Minnesota moratorium case. That case never stood for the sweeping proposition ascribed to it by these judges, and, moreover, it has been clearly limited by more recent decisions of this Court.

The statute in the Minnesota case provided that in mortgage foreclosure proceedings, prior to the expiration of the period of redemption, the mortgagor might apply to the court for an extension thereof to such time as the court

might deem equitable, but in no case beyond May 1, 1935. The court was required to find the reasonable income or rental value of the property, and as a condition to extension, order the mortgagor to pay all or a part of that value on taxes, insurance, and upon the mortgage. The statute was in the nature of emergency legislation, effective for a very brief period, and while it changed the remedy which the law had theretofore provided for the enforcement of mortgages, by depriving the mortgagor of the right of possession of the property for a short period, it gave the mortgagor the equivalent of possession, to wit, the rental value during the period possession was withheld from him. That statute was held to be constitutional by this Court by a five to four decision. It was obviously a border line case, and later decisions have clearly demonstrated that fact.

In *Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934), a statute of the State of Arkansas exempted from judicial process the proceeds of insurance policies payable to residents of the state. That act was held unconstitutional, and in distinguishing the Minnesota case, Mr. Chief Justice Hughes said (p. 432):

> "We held in *Home Building & Loan Assn.* v. *Blaisdell, supra*, pp. 434, *et seq.*, that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests of its people. • • • But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, *and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.* • • •

> In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

In *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), this Court had under consideration an Arkansas statute changing the method for the enforcement of taxes in a municipal improvement district. Mr. Justice Cardozo, in delivering the opinion of the Court, said (p. 60):

> "To know the obligation of a contract we look to the laws in force at its making. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Louisiana* v. *New Orleans*, 102 U. S. 203; *Barnitz* v. *Beverly*, 163 U. S. 118; cf. *Home Building & Loan Assn.* v. *Blaisdell*, *supra*, at pp. 429, 434, where the cases are assembled. The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected."

After pointing out that the changes in the remedies provided for the enforcement of taxes destroyed all the incidents that give value to collateral security, he said (p. 63):

"Upholders of the challenged acts appeal to the authority of *Home Building & Loan Assn.* v. *Blaisdell, supra,* the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. 'The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.' 290 U. S., at p. 445. None of these restrictions, nor anything approaching them, is present in this case. There has been not even an attempt to assimilate what was done by this decree to the discretionary action of a Chancellor in subjecting an equitable remedy to an equitable condition. Not Blaisdell's case, but Worthen's (*W. B. Worthen Co.* v. *Thomas, supra*), supplies the applicable rule."

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935), the Frazier-Lemke Act was held unconstitutional by the Supreme Court. Mr. Justice Brandeis, writing for the Court in that case, said (p. 602):

"For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

With these decisions as a guide let us again look to the New Jersey legislation. The sections which are important here are 351, 352 (*infra*, p. 75) and 403 (Appellant's brief, p. 112) of the Municipal Finance Commission Act. Generally, it is provided that no judgment or decree shall be enforced, and no proceedings, by mandamus or otherwise to compel the levy and collection of taxes, shall be commenced against a municipality (or its officers) in which the Municipal Finance Commission is functioning, so long as it shall function, except upon permission of the Supreme Court of New Jersey. The Commission functions until all past due bonds, notes and other indebtedness has been paid or refunded and cash is provided for those maturing in the next year. Section 351, which bars the enforcement of judgments, etc., is expressly limited to "bonds, notes or other obligations" in default.

The New Jersey statute falls within the category of the Arkansas statutes which the Supreme Court held unconstitutional in the two *Worthen* cases, *supra*. The legislation obviously denies the means of enforcing the contracts of the bonds and destroys such contracts. There is no limit of "reasonable conditions appropriate to the emergency." The relief afforded has no "reasonable relation to the legitimate end to which the State is entitled to direct its legislation." The relief is not temporary and conditional, and is not "reasonable from the standpoint of both creditor and debtor." The relief is not "limited to the exigency to which the legislation was addressed." The Act contains no real "limitations as to time, amount, circumstances or need."

We agree with that part of the concurring opinion of the single judge in the *Hourigan* case to the effect that, according to the Act, the "emergency" arises from a default in

the payment of municipal obligations and has nothing to do with any statewide or national emergency, and that the Act continues in effect so long as the municipality is in default. In effect, the New Jersey Act says that upon default of a single bond issue in a single municipality an emergency exists; that, upon the existence of an emergency, payment of contract obligations cannot be enforced; that payment of contractual obligations cannot be enforced so long as the default exists; and that so long as the default exists an emergency exists, etc., etc., *ad infinitum.*

Nowhere in the law is any provision made for payment to the creditor bondholder of interest or part of the interest accruing. Viewed in the light of the decisions above mentioned explaining the Minnesota Moratorium case, the Municipal Finance Commission Act cannot be considered reasonable and directed to a proper legislative end, and is, therefore, unconstitutional.

Mr. Justice Brandeis' comments regarding the Frazier-Lemke Act summarizes concisely the objection of the Appellee to the New Jersey Municipal Finance Commission Act. The Legislature of the State of New Jersey evidently determined that the public interest required that relief be extended to certain of the municipalities of the State, but it did not propose to put the burden of such relief upon the public, in whose interest it was to be given. Rather it chose to put the burden solely upon the creditors of the municipality, and not even upon all creditors, but only upon those whose claims against the municipality were represented by a bond, note or similar obligation. Everyone else would obviously benefit, but only that class would bear the burden.

Considered in connection with the other legislation of the State providing that the state tax, county tax, and operating expenses of the school district and borough are a charge on the borough's tax collections ahead of the bondholders, it is apparent that the only obligations against the taxes which suffer are the bonds. No one makes any sacrifice but the holders of said bonds, and their rights are confiscated in order to provide the relief which the "public interest" requires to be given to the taxpayers and citizens of the borough and school district.

(e) The Municipal Finance Commission Act Cannot Be Sustained as an Insolvency Act.

The whole tenor of Appellants' brief on the constitutionality of the stay provisions of the Municipal Finance Commission Act is, in substance, that the State of New Jersey may enact an insolvency statute applicable to contracts entered into prior to the enactment thereof and that the stay provisions, even if bad themselves, are valid because the entire Act, with its companion statutes, is a beneficial statute within the state's power. Any doubts which may have existed as to whether or not such enactments by state legislatures may be valid on that ground are dispelled by the recent decision of this Court in *Ashton et al.* v. *Cameron County Water Improvement District, etc.*, 298 U. S. 513 (1936), *rehearing denied* 299 U. S. 619 (1936), which held the first Federal Municipal Bankruptcy Act unconstitutitonal.

Mr. Justice McReynolds, for the majority, said (p. 531):

> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under the

> form of a bankruptcy act or otherwise. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 191. Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do."

For the minority, Mr. Justice Cardozo said (p. 534):

> "Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529. Relief must come from Congress if it is to come from any one."

As a corollary to their argument on this point Appellants attempt to divert the Court's attention from the legal argument by inferentially accusing Appellee of seeking to obtain a preference at the expense of other creditors and by suggesting that the Municipal Finance Commission Act is necessary in order to avoid such preference and a race of diligence among creditors. In that respect the Court is urged to uphold the act on the theory that it is a "supplement" to the second Federal Municipal Bankruptcy Act, so called, recently upheld by this Court in *United States* v. *Bekins,* 304 U. S. (Adv. Op.) 27 (1938).

Answering the first inference it must be obvious to the Court that this creditor is not seeking a preference over other creditors, but is seeking a remedy open to all other creditors, namely, a special tax for the payment of Appellee's judgment which will secure to it only its *pro rata* share of the tax collections and which will not be subject to the prior lien of state, county, school and municipal operating expenses.

Answering the second inference and the suggestion that the Act should be sustained as a supplement to the Municipal Bankruptcy Act, Appellants' argument involves an assertion of power in a state to supplement a federal bankruptcy act if the state does not think Congress has covered the subject to the state's satisfaction. No argument is necessary to demonstrate that this assertion of power is untenable.

Appellants contend that the Municipal Finance Commission is a receiver of the municipalities under its control under principles of equity receivership. They find little solace for this position in the decisions of the courts of New Jersey. In the *Hourigan* case, *supra,* the court went so far as to say that the Commission was authorized to exercise "powers somewhat akin to those exercised by receivers of insolvent corporations", but apparently did not wish to go so far as to say that the Commission is an actual receiver. Undoubtedly they were correct in refraining from accepting that interpretation of the act. The Commission is not an officer of the court, and is not appointed by the court. It does not take possession of the assets of the municipality as in the case of an equitable receivership, and it renders no account to the court. It has no power to levy local taxes in the municipality, although it may approve or disapprove budgets and otherwise control expenditures for local purposes. The levying of taxes in the Borough of Runnemede is purely a legislative matter which rests in the discretion of the Legislature of the State of New Jersey and as delegated by it to the Mayor and Council of the Borough and the Board of Education of the school district. The Municipal Finance Commission and the Supreme Court of the State of New Jersey can legally enforce

only the levying of taxes that are mandatory and required to be levied by the statutes of the state. Any attempt on the part of the Legislature to delegate discretion in levying taxes to an administrative or judicial agency of the government would be contrary to fundamental constitutional concepts and principles of home rule. *Township of Bernards* v. *Allen*, 61 N. J. L. 228 (E. & A. 1898); *Van Cleve* v. *Passaic Valley Sewerage Commissioners*, 71 N. J. L. 574 (E. & A. 1905).

It is submitted that without unlimited power to direct the raising of revenues in the municipality the Commission could never be on the same footing or occupy a position substantially comparable to a receiver in equity.

Appellants in their brief (p. 37) place great importance upon the decision of the Court of Errors and Appeals of New Jersey in *Vanderpoel* v. *Borough of Mt. Ephraim*, 111 N. J. L. 423 (1933), stating that that decision accepts "the modern doctrine that municipal creditors rank *pari passu* in the case of insolvency." We know of no such "modern doctrine", and we submit that that decision merely follows well established rules of law with respect to the application of the proceeds of taxes to the purposes for which such taxes were levied. The funds the creditor was attempting to levy execution upon in that case were *moneys on hand* which were raised for purposes other than solely the payment of the debts of the municipality. Any contention that the case means anything else is set at rest by a later decision of the same court in *Phelps* v. *Borough of Fort Lee*, 14 N. J. Misc. 895 (Sup. Ct. 1936), *affirmed per curiam* 118 N. J. L. 181 (E. & A. 1937), where it was held that a creditor holding tax anticipation notes of a municipality under the protection of the Municipal Finance Commission was

entitled to preference in payment out of any tax revenues on hand. The Court said (188 Atl. at p. 694):

> "The obligations were issued under legislative authority by force of which the holders thereof had a contractual obligation, which entitled them to payment either out of revenues received, but absolutely from taxes to be collected in the fourth year after issue. Possessed of such an obligation no change thereof can be effected by the Municipal Finance Commission Act or subsequent legislative enactment. Municipal revenues are dedicated funds and those holding a lien thereon are entitled to payment as the funds are realized. *Piscataway Township* v. *First Nat. Bank of Dunellen,* 111 N. J. Law 412, 168 A. 757, 90 A. L. R. 423."

Appellants, moreover, in their brief, confuse the decisions of the courts regarding the rights of municipal creditors, against an open fund, with those against a closed fund. As against the latter, if it is insolvent, they rank on a parity. With respect to the former they must be satisfied in the order in which writs of mandamus are issued against the fund. A closed fund is a trust fund and is administered according to equitable principles. That is not true of an open fund. This distinction is set forth in *State* v. *Carlton,* 103 Fla. 810 (1931) and *Moran* v. *State,* 111 Fla. 429 (1933), in the first of which cases the decisions throughout the country are analyzed.

POINT II.

The District Court did not err in its rulings as to the statutes governing the enforcement of Appellee's judgment.

The District Court included in its findings of fact and decree (R. 96) a declaration that the Appellee's rights to compel a tax levy for the satisfaction of its judgment are governed solely by Section 35 of the Execution Act and Section 237 of the School Law (printed as Appendices B and C, *infra,* pp. 81, 82) and that said sections were not repealed by the provisions of the Tax Act of 1918 (Appendix D, *infra,* p. 83).

Section 505 of the Tax Act deals with the same subject matter as Section 35 of the Execution Act and Section 237 of the School Law. A cursory reading of this section of the Tax Act will be sufficient to determine that it is not inconsistent with the previously enacted Execution Act and School Law. The three sections can be read together and since the Tax Act does not contain an express repealing clause, the former acts are still in effect. It is of little import to the decision in this case that the Tax Act is said to have been inferentially omitted from the enumeration of acts governing the rights of the Appellee, and any error in that respect is one of form and not of substance. There is no possibility of the County Board of Taxation adding the amount of an execution to the municipal tax levy, if such has been added thereto by the assessors of the municipality, for the Tax Act expressly says it shall not if such is the case. The Tax Act simply provides an alternative method of procedure, particularly applicable if the local

tax ordinance has been passed and sent up to the County Tax Board before the execution could be served on the local officials. There is no reversible error in the decree below on this ground.

POINT III.

The District Court did not err in enjoining the acceptance of bonds in payment of taxes and in its ruling as to the rights of Appellee in that respect.

The action of the Borough Tax Collector, by and with the approval of the Municipal Finance Commission, in accepting bonds of the Borough in payment of taxes due the Borough is also a violation of Appellee's constitutional rights and equally detrimental to the efforts of the Appellee to enforce payment of its judgment. The Municipal Finance Commission had passed a resolution in October 1935 discontinuing the practice (R. 60). However, the practice did not cease, for the two instances set forth in the complaint (R. 18, par. 6) were consented to by the Commission on January 31, 1936 and February 14, 1936, respectively (R. 225 *et seq.*; R. 218 *et seq.*).

As stated heretofore, it is contended by the Municipal Finance Commission that the first lien on the taxes collected by the municipality is the lien of the state for its share of the taxes. Second comes the lien of the county. Third and fourth come the liens of the operating expenses of the school district and borough. The bondholders are entitled only to what is left. The testimony of the Commission's Auditor Gary in the mandamus proceeding (R. 185, Ex. Res. 4) indicates that for the past few years the Borough

has been able to collect in taxes only amounts barely sufficient to pay the first four items, leaving nothing for creditors. Appellants thereupon proceed to compromise the taxes that are left at amounts less than the face value thereof, and to accept, at full face value, in payment of the compromised taxes bonds of the Borough, in default as to principal, or interest, or both, thus effectively shutting off the creditors from ever obtaining any payment on account of their defaulted bonds.

Appellee's judgment and bonds are payable in money only and taxes are payable in money, *3* COOLEY *on Taxation* (4th Ed.), p. 2483. Illustrative of this rule is *City of Enterprise* v. *Rawls*, 204 Ala. 528 (1920), an action of assumpsit by the city for delinquent taxes to which defendant pleaded performance of an agreement with the city in crediting the amount of the tax upon a city note held by him. Holding for the city, the court said (p. 529):

> "Taxes are not debts; they do not result from contractual obligations; they are contributions required for the support of the government. Judson on Taxation (2d Ed.) sec. 452; 37 Cyc., p. 706. Unless qualified in the context, the term 'taxes' or 'tax' is used in the sense of money—an exaction to be alone discharged in money. Desty on Taxation, p. 6; Galloway *v.* Town of Tavares, 37 Fla. 58, 19 South 170, 171; 37 Cyc., pp. 706, 708; 1 Cooley on Taxation, p. 15, and note 2; City of Shreveport *v.* Gregg, 28 L. Ann. 836, 837."

To the same effect is *Eggleston* v. *Plowman*, 49 S. D. 609 (1926), and cases cited therein.

In suits brought by holders of bonds of defaulting municipalities the federal courts have, without exception,

held unconstitutional statutes enacted after the issuance of the bonds, authorizing acceptance of bonds in payment of taxes and special assessments.

Crummer v. *City of Fort Pierce*, 2 F. Supp. 737 (S. D. Fla. 1932), held a statute unconstitutional, enacted subsequent to the issuance of plaintiffs' bonds, authorizing Florida municipalities to accept bonds in payment of taxes.

The statutory three-judge court, by Bryant, Circuit Judge, after reciting that the defendant had $3,500,000 of bonds outstanding and had been in default thereon for two years, said (p. 737):

> "All the bonds and coupons of the city, including those held by complainants, were issued prior to the year 1931, and were payable in money only. Chapter 15810, enacted in 1931 (Sp. Acts), purports to make the city's outstanding bonds and matured interest coupons, in lieu of money, receivable in payment of taxes for debt-service purposes. The combined effect of the statute, of compliance with it, and of the city's default upon its bonded indebtedness, has been to depreciate the market value of the bonds and coupons to such an extent that they are being bought for about 20 per cent. of their face value, and are being turned in to the city by landowners at face value in payment of taxes. Complainants, as well as all other bondholders who are not also taxpayers, are prejudiced and discriminated against because they will be compelled either to sell their bonds and coupons at their greatly depreciated market value or to hold them without any reasonable expectation of having them paid off so long as other bonds or coupons are available for payment of taxes.
>
> "In our opinion it is true, as alleged by the complainants, that the bonds when issued were required by law to be paid off only in money. The city charter

simply authorized the city to issue bonds for public improvements, and the form of warrant authorized to be issued to the tax collector clearly implied that only money could be accepted in payment. In the absence of special permission to discharge its bonded debt otherwise, the city was bound to pay in lawful money. Frier *v.* State, 11 Fla. 300; Finnegan *v.* City of Fernandina, 15 Fla. 379, 21 Am. Rep. 292. It is manifest that the city's bonded indebtedness would not be paid in money if the taxes could be discharged on bonds and coupons. Undoubtedly the statute of 1931, if valid, would change the city's obligation under its contract; and we entertain no doubt that it would also impair that obligation. The bondholders, being entitled under their contract to be paid in money, cannot be postponed in their rights until all bonds except theirs have been retired by being used in payment of taxes. As long as taxes can be paid with depreciated bonds, it cannot reasonably be expected that the city will collect any substantial amount of money with which to retire matured bonds and coupons. As a general rule, city bonds cannot be used as a set-off against city taxes. Finnegan *v.* City of Fernandina, *supra*. Of course, the right of set-off exists where the law permits it and the contracting parties agree."

In that case, as here, plaintiffs were bondholders who owned no property in the city.

The *Fort Pierce* case was followed in *McNee* v. *Wall*, 4 F. Supp. 496 (S. D. Fla. 1933). This case went to the United States Supreme Court and was remanded as being within the jurisdiction of the district judge rather than a three-judge court (296 U. S. 547 (1935)). On re-trial, *McNee* v. *Wall*, 13 F. Supp. 326 (S. D. Fla. 1935), the court followed *Crummer* v. *Ft. Pierce*, *supra*, and reiterated the

first decision. *Keefe* v. *City of St. Petersburg*, 5. F. Supp. 132 (S. D. Fla. 1933), to the same effect, was decided on the authority of the *Fort Pierce* and *McNee* cases, *supra*.

The question was again presented in *Harris* v. *City of Miami*, 5 F. Supp. 305 (S. D. Fla. 1932), with the same result. The opinion of the court in that case contains enlightening comments on the legal and economic aspects of this problem.

The same conclusion was reached in another well reasoned opinion in connection with a similar situation in *N. & W. Ry. Company* v. *Boyle, Treasurer*, 12 F. Supp. 522 (N. D. Ohio, 1935).

Attempts are usually made, as is done here by Appellants, to justify the acceptance of bonds in payment of delinquent taxes by asserting that it relieves the home owner of a severe burden and tends to enable him thereafter to pay his taxes currently. In practice, however, it is found that it is made use of to a considerable extent by corporate investing institutions and mortgagees who have dispossessed the home owner through foreclosure proceedings, and these are usually quite capable of paying the taxes on the properties in cash in full. The record in this case amply illustrates that fact. Moreover it appears that many of these corporate taxpayers who took advantage of the opportunity to pay their taxes in bonds, each owned a considerable number of parcels of property. The minutes of the Municipal Finance Commission in this case furnish the following names of such taxpayers who were permitted to compromise back taxes and tc satisfy the compromised amou . in bonds (R. 218-311):

Prudential Insurance Co.
Metropolitan Life Insurance Co.

John Hancock Life Insurance Co.
First Camden National Bank
Gloucester County Mortgage & Guaranty Trust Co.
Fire Association of Philadelphia
Woodlynne National Bank
Woodlynne Building & Loan Ass'n
Camden Optional Bldg. & Loan Ass'n
Atlas Beneficial Loan Ass'n
Barrington Bldg. & Loan Ass'n
Citizens Building & Loan Ass'n
Big Timber Bldg. & Loan Ass'n
Hammonton Building & Loan Ass'n
Blackwood Building & Loan Ass'n
Victory Building & Loan Ass'n
First Mortgage Service Co.

Strangely enough, we also find among the list of those taking advantage of the opportunity of discounting their taxes by paying the same with bonds, two Borough officials, Albert W. Spencer, Tax Collector (R. 273-277), and an Appellant herein, and John Gaunt (R. 257-266), who was Borough Clerk at the time the tax settlements were made.

So, we find in the operations of this Borough, the same vicious circle which was being followed in the cases above cited. The Borough under the protection of and with the active assistance of the Municipal Finance Commission, was withholding payment of any kind on the outstanding bonds, and resisting in court all efforts of creditors to obtain any payment thereon, the effect of such action being to depress the value, and, consequently, the market price of the securities of the borough and school district. This permitted taxpayers including officers of the Borough, to purchase bonds at these depressed prices for use in paying their taxes to the tune of $62,000 (R. 171); it also permitted the

borough to purchase such bonds to the extent of $74,000 face amount at such depressed prices with funds on hand (R. 184) which should have been applied in *pro rata* payments on all the defaulted bonds of the borough, and prevented the accumulation of additional tax money for servicing the debt of the borough and school district.

It is significant to note (R. 171) that the borough accepted no school district bonds in payment of taxes. This appears to have been a further discrimination against holders of school district bonds.

In connection with the purchase of bonds with funds on hand the testimony of Gary, the Commission Auditor (R. 170) is very significant. It is apparent that this use of funds was not indulged in except at the instance of the Municipal Finance Commission for this testimony shows that the "co-operative bondholder" who was active in the borough in this connection was also "co-operative" with the Municipal Finance Commission in other municipalities in which the Commission was functioning.

Appellants in their brief (R. 50) quote the statute authorizing the compromise of taxes which was in force at the time Appellee's bonds were issued and then say that there is nothing in that statute limiting the scope of such compromises to cash. However, the statute quoted says, "said governing body may fix and determine *an amount* to be accepted by such municipality * * * the purchaser shall *pay* to the Collector of taxes * * * *the amount* fixed and determined as aforesaid * * * the *said sum* shall be accepted", etc. Appellee does not contend that the Borough and Municipal Finance Commission have no power to compromise taxes, but does contend that such compromises can be made only for cash, and the injunction issued

by the District Court is directed only against the acceptance of bonds as a part of such compromises.

We have no doubt but that the Court had in mind the purchase of bonds with funds on hand, and the acceptance of bonds in payment of taxes, as well as the active part the Commission was taking in court to defeat creditors in their attempts to collect on defaulted obligations, when it issued its injunction restraining in general terms the Municipal Finance Commission from functioning in the Borough in such manner as to impair Appellee's right to enforce its judgment.

We submit that the lower Court did not err in issuing its injunction in general terms restraining all such action.

POINT IV.

The three-judge court had jurisdiction of the cause.

Appellants urge that the lower Court had no jurisdiction, as a three-judge court acting under Section 266 of the Judicial Code (28 U. S. C., Sec. 380), to hear or determine this suit, and therefore, presumably, this Court has no appellate jurisdiction to review the merits. The argument advanced under Point III of their brief is divided into two parts and is presented as if one part had no relation to the other. It deals, first, with jurisdiction as to the cause of action attacking the stay provisions of the Municipal Finance Commission Act (Counts one and four of complaint, R. 3, 20), and second, with jurisdiction as to the cause of action attacking the provisions concerning the acceptance of bonds in payment of taxes (Count three of Complaint, R. 17). Appellants' contentions will be answered here in the same order and Appellee will also dem-

onstrate the inter-relation of the two, for the question must be treated as a whole as well as from the standpoint of the separate counts of the complaint.

(a) As to the question of jurisdiction with respect to the stay provisions of the statute.

Appellants' argument under this head, when carefully analyzed, amounts to nothing more than a contention that the three-judge court lacked jurisdiction to hear the cause at its inception or to determine it after final hearing, because, they say, the injunction actually decreed against the Municipal Finance Commission is ineffective to carry out the Court's conclusion that the stay provisions are unconstitutional. The legal consequence alleged to flow therefrom is the lack of a substantial question warranting a three-judge court. Appellants pose this problem solely as one of *jurisdiction* of a court under Section 266. (There is no error assigned or urged, for indeed none exists, that the complaint is lacking in equity or that any element of federal jurisdiction is absent.) We proceed to discuss the narrow issue thus presented without in any wise conceding the alleged sterility of the form of injunction decreed.

We submit that Appellants have misconceived the requisite elements of jurisdiction under Section 266. The primary essential of such jurisdiction is a substantial claim of federal unconstitutionality of a state statute or order. *Louisville & N. R. R. Co.* v. *Garrett*, 231 U. S. 298 (1913); *Ex parte Buder*, 271 U. S. 461 (1926); *Ex parte Poresky*, 290 U. S. 30 (1933).

This must be determined by the allegations of the complaint. This rule is well expressed by this Court in *Ex parte Poresky, supra*, (p. 32):

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. *Mosher* v. *Phoenix*, 287 U. S. 29, 30; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105. The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co.* v. *Morrin, supra; Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288; *McGilvra* v. *Ross*, 215 U. S. 70, 80."

See *California Water Service Co.* v. *Redding*, 304 U. S. (Adv. Op.) 252, 254 (1938).

Although Appellants' argument under sub-division A of their brief (p. 53 *et seq.*) is not clear, there certainly is no basis for attack upon the jurisdiction of the lower Court on the ground that the complaint here is lacking in allegations demonstrating a substantial question of unconstitutionality. All Appellants say, in substance, along this line (p. 56) is that Appellee did not present a cause of action in its complaint entitling it to a decree against the Municipal Finance Commission enjoining enforcement of the stay provisions, because the members of the Commission have no statutory power to enforce or relax the stays. Assuming for present purposes only that the injunction so decreed is ineffective, it is clear that no *three-judge court jurisdictional* defect at the inception of the case could arise from that fact within the test laid down in *Ex parte Poresky, supra.*

The complaint here is most adequate in its allegations to confer jurisdiction in the inception on the Court below.

Counts one, two and four (R. 3, 15, 20) specifically set forth the statutory stay provisions, allege that they are unconstitutional as impairing the obligation of the contract of Appellee's bonds and judgment thereon, set forth facts showing the various interferences of the Municipal Finance Commission in the collection of that judgment by reason of its acting under the stay provisions and its general functioning in the municipality, and show Appellee's damage and lack of any other adequate relief therefrom. These allegations have been analyzed in detail in the Statement of the Case of this brief (pp. 3-6, *supra*). Appellants recognize the existence of this substantial constitutional question, for the stipulation of facts (R. 119, par. 23) establishes that there is a controversy between the parties on the point; appellants devote the first portion of their brief to a defense of constitutionality, and Point III of their brief is written on the express assumption that the stay provisions are unconstitutional (Caption of Point III, p. 53).

Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1934), cited by Appellants (p. 54), has no application to our situation. This was a clear case where this Court found (p. 18) that not only was there no question of validity of a state statute involved, but that the action of the state agency challenged on the face of the bill of complaint was merely an assessment of taxes and not a statute or order within the meaning of Section 266.

There is, then, no basis whatever for the argument that the lower Court had no jurisdiction in the inception in view of the fact that the allegations of the bill of complaint disclose a constitutional question of substance and injunctive relief is sought. Appellants' argument mistakes this rule of jurisdiction.

Appellants further urge, in substance, that a three-judge court had no jurisdiction because the injunction actually decreed does not go as far as Appellee prayed, and because, as issued, it is alleged to be ineffective. It is intimated that jurisdiction was divested, because the Court only enjoined the Municipal Finance Commission from functioning in Runnemede to the extent that such functioning is inconsistent with Appellee's right to enforce its execution, the stay provisions being declared unconstitutional. Having shown that a substantial question of unconstitutionality was presented by the complaint requiring the convening of the three-judge court and that the Court thereby acquired jurisdiction at the inception, it remains to be demonstrated by the Appellee that the lower tribunal was not required to relinquish its jurisdiction at any time during the proceedings by reason of the conclusions which it reached or the relief to which it finally found Appellee was entitled.

Counts one, two and four of the complaint prayed for an injunction restraining the Municipal Finance Commission from *functioning at all* in the School District of the Borough of Runnemede on the ground of the unconstitutionality of the stay provisions. (R. 14, 16-17, 20-21.) Appellants admit (p. 58) that such a complete injunction would be without objection from the point of view of effectiveness, and it must follow therefrom that, had such a restraint been awarded, Appellants, on their own theory, would have been unable to make any argument whatsoever on this issue of jurisdiction. (In this connection it is interesting to note that their argument on the merits seeking to support the constitutionality of the stay provisions (Appellants' brief, Point I) proceeds on the theory that the entire

Municipal Finance Commission Act and companion acts must be treated as an indivisible whole and the validity of the stays is urged on that ground. The injunction on the merits might well have gone, then, to the full extent of the prayers, and the good in the acts would have had to fall with and because of the inseparable bad.) Appellants' jurisdictional contention must rest solely on the basis that the Court below gave an injunction narrower in scope than that prayed for and lost all jurisdiction of the entire case as a result, despite the presence of the essential jurisdictional elements in the complaint as hereinbefore demonstrated.

To state the contention is to refute it. The law is very definitely established that a three-judge court once having obtained jurisdiction by the presence of a substantial federal question, can give relief upon a non-constitutional ground or rest its decision solely on the basis of a local issue, without even passing upon the federal question. *Louisville & N. R. R. Co.* v. *Garrett*, 231 U. S. 298 (1913); *Davis* v. *Wallace*, 257 U. S. 478 (1922); *Sterling* v. *Constantin*, 287 U. S. 378 (1932); *Glenn* v. *Field Packing Co.*, 290 U. S. 177 (1933); *Lee* v. *Bickell*, 292 U. S. 415 (1934); *Railroad Commission of Calif.* v. *Pacific Gas & Electric Co.*, 302 U. S. 388 (1938).

The principle is defined in *Davis* v. *Wallace, supra,* (p. 482):

> "The case made by the bill involved a real and substantial question under the Constitution of the United States and the amount in controversy exceeded three thousand dollars, exclusive of interest and costs, so the case plainly was cognizable in the District Court. In such a case the jurisdiction of

> that court, and ours in reviewing its action, extends to every question involved, whether of federal or state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case."

Specific illustrations of the application of the rule are found in *Glenn* v. *Field Packing Co.*, 290 U. S. 177 (1933), *supra*, and *Lee* v. *Bickell*, 292 U. S. 415 (1934), *supra*. In the former case plaintiff sued to enjoin the enforcement of a Kentucky statute excessively taxing oleomargarine, on the ground of repugnancy to the Fourteenth Amendment. A three-judge court held that the statute was in reality a prohibition of the sale of oleomargarine in the state, and therefore a violation of the state constitution. The federal question was not decided. Defendant appealed to this Court, and the basis of the decision of the lower Court was found to be valid and within the jurisdiction of such three-judge court.

In *Lee* v. *Bickell*, *supra*, a bill was brought to restrain the enforcement of a Florida stamp tax statute with reference to certain documents of plaintiff's, on the ground of violations of the due process and commerce clauses of the federal constitution. The three-judge court held that the documents did not come within the purview of the stamp tax act and that, if the act were otherwise construed, it would be in conflict with the Fourteenth Amendment. This Court held, upon appeal, that the second question should not have been passed upon since decision on the local question was proper and dispositive of the case.

It must follow, *a fortiori*, that a three-judge court has jurisdiction to award relief narrower in scope than that

prayed, where the federal question was decided, and the injunction issued on that ground, as was done in the instant case.

The only authority appellants cite in support of their most unusual jurisdictional theory is *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 (1934). There the gas company brought an equity suit in federal court to enjoin, on constitutional grounds, the enforcement of an order made by a state board directing it to supply gas to the packing company at a lower rate and to enjoin the latter from continuing the prosecution of a state court suit to recover the excess in rates paid. The bill presented on its face a substantial constitutional question and a three-judge court was convened. It appeared, however, during the course of the proceedings, that the enforcement of the challenged order was already restrained in the state court litigation, and consequently, the state board was not threatening to and could not enforce it. The only issue remaining—enjoining the state court suit—was held not to require the intervention of a federal court, and the case was dismissed for want of equity jurisdiction. On the gas company's appeal, this Court held, in effect, that the real defect was want of jurisdiction of a three-judge court. Mr. Justice Stone pointed out that such a tribunal, although convened properly as a result of adequate pleading allegations, must relinquish its jurisdiction when it appears "that there was never any basis for relief of any sort against the state officers" (p. 391). That certainly is not the case at bar. There the state officers were already prevented from acting; here they were continuing to act and interfere under the statute. Appellants apparently do not urge that there was no right to relief of any sort against the members of the commission;

on the contrary their entire jurisdictional thesis is based on the contention that they could not be enjoined in the way the lower Court did only because the language of the restraint is ineffective to carry out the decision that the stays are unconstitutional. We submit that such an argument is no valid attack upon the jurisdiction of the Court below for it has nothing to do with jurisdiction.

Moreover, despite the fact that Appellants only urge the ineffectiveness of the form of the injunction on the issue of jurisdiction, we submit that, for all purposes, the injunction as issued is effective and in perfectly proper form in the circumstances. It is found in two parts of the decree: with respect to count one dealing with the effect of the stay provisions upon enforcement of the present judgment (R. 96), and with respect to count four awarding declaratory relief for the future (R. 99). The complete language is "that defendant Municipal Finance Commission be permanently enjoined and restrained from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution in the manner herein stated, but without prejudice to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act, except as the stays therein contained affect the right of the complainant to enforce its judgment" (R. 96).

The decree of injunction is in the only language which could possibly be used. The stay provisions of the statute are very astutely drawn. They all commence: "Whenever the municipal finance commission shall function in any municipality and so long as it shall continue so to do . . ." (Appendix A, *infra*, pp. 75, 76, 77), and proceed to de-

clare that the stays shall thereupon be operative. It is not unreasonable to surmise that the stay provisions were thus drawn purposely to try to avoid injunctive relief against their operation. The Court below refused to be baffled by such an ingenious circumlocution.

The facts in this case, alleged in the complaint (R. 10-13) and affidavit annexed thereto (R. 26-44) and pointed out in detail in the Statement of the Case (*supra*, pp. 8-14) of this brief, is convincing in demonstrating the interference of the Municipal Finance Commission, by counselling, maneuvering and intervening, in efforts by judgment creditors in the federal courts seeking to satisfy their claims. Such action and execution of policy by the Commission can only find basis in the statute by virtue of the stay provisions. Appellants' conduct, therefore, demonstrates that these stay sections provide for, permit and have resulted in affirmative action under them beyond the so-called automatic incidents of operation which Appellants suggest. We believe the intent of the Court below, in using the injunctive language and form which it did, it having determined that the statute is divisible, was to restrain all such conduct, and at the same time, while declaring the stay sections unconstitutional, to say in effect: "These sections are unconstitutional, and the statute from now on must be considered and executed without them. The Municipal Finance Commission must stop interfering with judgment creditors of the municipality and is no longer to do any acts based upon the policy or the language of the provisions we have struck down." The District Court was forced to use the language of the act in its restraint; its exact meaning and application will have to be determined by that Court as occasion arises. It certainly is not in issue on this appeal.

(b) As to the question of jurisdiction with respect to the provisions concerning the acceptance of bonds in payment of taxes.

Appellants treat the relief sought in count three of the complaint (R. 17) as if it had no connection with that prayed for in the other counts, and consequently seek to treat the question of the jurisdiction of the three-judge court as requiring a separate and distinct basis here from that required with respect to the other counts. On the contrary, the common purpose of all counts of the complaint is clear. All deal with illegal actions by Appellants taken pursuant to unconstitutional sections of the statute challenged by this suit. All of such actions hindered and interfered with Appellee in its efforts to satisfy its judgment under the laws of New Jersey in force at the time these bonds were issued. Therefore, we submit, that a finding of jurisdiction in the three-judge court as to any count permitted it to decide all issues presented by the other counts. *Louisville & N. R. R. Co.* v. *Garrett*, 231 U. S. 298 (1913); *Davis* v. *Wallace*, 257 U. S. 478 (1922); *Railroad Commission of Calif.* v. *Pacific Gas and Electric Co.*, 302 U. S. 388 (1938).

Under the decree as to count three the Municipal Finance Commission and the Borough Tax Collector were enjoined from making settlement for taxes by any medium except in accordance with the laws of New Jersey (R. 98).

Specifically referring to Appellants' argument under sub-division B of their brief (p. 61 *et seq.*), we find no claim asserted that the complaint fails to allege or show the existence of a substantial question as to constitutionality or that the relief granted is ineffective. In fact Appellants

again assume under this head that Section 212 of the Municipal Finance Commission Act (Appendix C to Appellants' brief, p. 102) and action taken pursuant thereto, as alleged in count three of the complaint, is unconstitutional. The sole contention is that the Municipal Finance Commission is here only a colorable defendant and that therefore the application for an injunction against the acceptance of bonds in payment of taxes raises no question calling for the assembly of a three-judge court. The rationale of the argument seems to be that the Borough Tax Collector is the only proper party to be enjoined from accepting bonds in payment of taxes following compromises, despite the fact that, under the statute, he may not do so unless the Finance Commission consents.

Appellants baldly say that joinder of the Commission is colorable but they are unable to cite a single authority in point establishing this astounding conclusion. We submit there is no basis whatever for the characterization. Under Section 212, above referred to, the consent of this state agency is vital to the compromise of taxes and acceptance of bonds in payment thereof. By enjoining them from assenting on the ground of unconstitutionality of the statute and action thereunder, the unlawful practice is stopped at the proper place—the spot where the ultimate authority lies. In fact, if any party might be omitted from the injunction, it would be the Tax Collector and not the Commission for he may only act after the latter has approved.

A case exactly analogous with the situation at bar is *Norfolk and Western Railway Co.* v. *Board of Public Works of West Virginia*, 3 F. Supp. 791 (S. D. W. Va., 1933). An injunction was there sought, on constitutional grounds, against state officers and sheriffs (the county offi-

cers charged by law with the collection of taxes) to restrain the collection of certain taxes levied against the plaintiff. The same line of argument here urged was made to the thee-judge court there, namely, that the sheriffs were the only proper parties to be enjoined and the state officers were colorably joined to oust a one-judge court of jurisdiction. The Court disposed of it as follows (p. 793):

> "It is strongly contended on behalf of the defendants that the sheriffs of the respective counties are, in effect, the only officers sought to be enjoined, as they are the only officers who could actually enforce collection of the taxes involved, and that they are not state officers but are county officers under the Constitution and statute of West Virginia (section 1, article 10, Constitution of West Virginia; Code of West Virginia, chapter 7, article 5, § 1). This contention cannot be maintained because it must be remembered that under chapter 11, article 6, § 18 of the Code of West Virginia the sheriffs act only upon the certificate of the state auditor and cannot levy for collection of taxes until that certificate is received by them. One of the purposes of this suit is to enjoin the auditor from making such a certificate."

Appellants cite *Pleasant* v. *Missouri-Kansas-Texas R. Co.*, 66 F. 2d 842 (C. C. A. 10th, 1933), *certiorari denied* 291 U. S. 659 (1934). There, on appeal from a case tried before one judge, defendants urged that a three-judge tribunal was required because an injunction against the collection of allegedly unconstitutional taxes was sought against state officers as well as the local collecting authorities. The argument was rejected because the Court found that the state officers had completely fulfilled their duties and no longer could do anything which could affect the tax

or its collection and consequently could not prejudice the rights of the plaintiff in any way. It said (p. 844): "No facts are alleged as to further action contemplated by such state officers which it is sought to enjoin; . . . ." The decision is no authority in the instant case because of this vital difference in the facts. It is interesting to note that the Court in the *Pleasant* case, *supra* (p. 844), distinguished *Norfolk & Western Railway Co.* v. *Board of Public Works of West Virginia, supra,* on the ground that in the latter case the state officers still had acts to perform before the local authorities could proceed.

Appellants attempt an argument by analogy on the theory of indispensable and proper parties with respect to federal jurisdiction based on diversity of citizenship. The contention seems to be that the Tax Collector is the only indispensable party and the Municipal Finance Commission is simply an unnecessary party, and therefore the joinder of the latter was colorable. The argument falls, as has already been demonstrated, because the Commission is a necessary party. The scheme of acceptance of bonds in payment of compromised taxes cannot be carried on without the express consent of the Commission. Accordingly, since state officers were sought to be enjoined, and in fact, were restrained, from giving such vital consents, it is apparent that jurisdiction existed in the three-judge court as to count three alone and Appellants' argument is without merit.

It should be noted that Appellants request this Court to reverse the decree below and remand the cause, if it should find that no case was presented which called for Section 266 to come into operation, on the authority of *Gully* v. *Interstate Natural Gas Co,* 292 U. S. 16 (1934)

supra. We submit that, in the event of such a holding the proper procedure would be simply to dismiss the appeal without reversal, for Appellants have already taken an appeal from this same decree to the Circuit Court of Appeals for the Third Circuit, which appeal has been stayed pending the decision of this Court. Such a procedure would be in accord with that followed in *Healy* v. *Ratta,* 289 U. S. 701 (1933), 67 F. 2d 554, 556 (C. C. A. 1st, 1933).

CONCLUSION.

Appellee respectfully contends, for the reasons herein urged, that the decree of the lower Court should be affirmed.

Respectfully submitted,

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Appendix A.

STAY PROVISIONS OF THE MUNICIPAL FINANCE COMMISSION ACT.

New Jersey Laws of 1932, Chapter 236 Supplementing Laws of 1931, Chapter 340.

ARTICLE III-A.

Remedies.

351. Whenever the municipal finance commission shall function in any municipality and so long as it shall continue so to do, no judgment, decree, levy or execution against such municipality or the property thereof for the recovery of the amount due on any bonds, notes or other obligations of the municipality, in the payment of which such municipality has defaulted, shall be enforced until otherwise specially ordered by the Supreme Court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be and it hereby is stayed until otherwise specially ordered as aforesaid. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1933, Ch. 330.)

352. Whenever the municipal finance commission shall function in any municipality and so long at it shall continue so to do, no action or proceeding of any kind either direct or ancillary, by way of mandamus or otherwise shall be brought against such municipality or any public officers for the assessment, levy or collection of taxes by or for such municipality and any and all actions or proceedings therefor shall be and they hereby are stayed; except that first, the Supreme Court or a justice thereof, after notice to the commission, may authorize one or more creditors of such municipality to bring and maintain an action or proceeding therefor in the Supreme Court, which shall be brought for

the benefit of themselves and all other creditors of such municipality and in which all other creditors of such municipality shall have the right to intervene and assert their claim and in which all other creditors of such municipality may, and said commission shall, be made parties in such manner and upon such notice as the Supreme Court shall approve; and except that, second, the municipal finance commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceeding or proceedings for the assessment, levy or collection of taxes by such municipality for the payment of principal and/or interest of the indebtedness of the municipality found to be outstanding as provided in section two hundred and one of this act. Without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the Supreme Court in any such proceeding may, to the extent which it shall deem just and equitable, afford to the holders collectively of any due and unpaid claims against a municipality any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; provided, however, that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is sought are claims upon which a judgment could be obtained. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1933, Ch. 330, and P. L. 1936, Ch. 50.)

353. Whenever the municipal finance commission shall function in any municipality and so long as it shall continue so to do, it may prepare and certify to the governing body of such municipality resolutions providing in substance that any and all moneys collected as taxes by the

municipality over and above an amount sufficient to pay the reasonable current operating expenditures of such municipality (not including therein the principal or interest of any bonds or notes of the municipality) and such capital expenditures, if any, as may be approved by the municipal finance commission as reasonably necessary to preserve the value of the taxable property within such municipality, shall be paid by the municipality to such banks or trust companies as the governing body of the municipality may designate. (Added by P. L. 1932, Ch. 236.)

354. Whenever the Municipal finance commission shall function in any municipality and so long as it shall continue to do so, no action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is to affect the disposition of property or funds owned or controlled by the municipality, except as provided in this act. If any such municipality has in its possession or under its control, or there is in the possesion or under the control of the commission, any property or funds of such municipality which are or may be available for the payment of interest or principal upon any of the debts of such municipality (over and above the payment of the current operating expenses of the municipality and the maintenance of a reasonable working capital), then such municipality in its discretion may apply, or if directed by the commission shall apply, to the Supreme Court to determine the application and distribution of such property or funds to and among the creditors of the municipality, and in any such case the Supreme Court in its discretion may permit an application for relief of the same character to be made by any creditor of the municipality. In any such proceeding all creditors of the municipality shall be made parties thereto in such manner and upon such notice by publication or otherwise as the Supreme Court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds. In case any such proceeding shall be instituted, the Supreme Court may direct the municipality to make no payments from any of such mon-

eys so available until the determination of the proceeding or until permitted by the Supreme Court. Unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the Municipal Finance Commission. (Added by P. L. 1935, Ch. 191, and amended by P. L. 1935, Ch. 314.)

355. Upon the application of any creditor made upon notice to the municipality and the commission, the Supreme Court may vacate, modify or restrict any statutory stay contained in this article. (Added by P. L. 1936, Ch. 50.)

Laws of 1935, Chapter 258.

17. Remedies. Whenever the commission shall function in a municipality having a school district coterminous therewith which is governed by the provisions of Article VII of the school law,

(a) no judgment, decree, levy or execution against such school district or the property thereof for the recovery of the amount due on any bonds, notes or other obligations of the school district, in the payment of which such school district has defaulted shall be enforced until otherwise specially ordered by the Supreme Court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be and it hereby is stayed until otherwise specially ordered as aforesaid;

(b) no action or proceeding of any kind either direct or ancillary, by way of mandamus or otherwise, shall be brought against such school district, municipality, or any public officers for the assessment, levy or collection of taxes for such school district and any and all actions or proceedings therefor shall be and they hereby are stayed except that first, the Supreme Court or a justice thereof, after notice to the commission may authorize one or more creditors of such school

district to bring and maintain an action or proceeding therefor in the Supreme Court, which shall be brought for the benefit of themselves and all other creditors of such school district and in which all other creditors of such school district shall have the right to intervene and assert their claim and in which all other creditors of such school district may, and said commission shall, be made parties in such manner and upon such notice as the Supreme Court shall approve; and except that, second, the commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceeding or proceedings for the assessment, levy or collection of taxes for such school district for the payment of principal and/or interest of the indebtedness of the school district found to be outstanding as provided in section one of this act; without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the Supreme Court in any such proceeding may, to the extent which it shall deem just and equitable, afford to the holders collectively of any due and unpaid claims against a school district any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; provided, however, that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is sought are claims upon which a judgment could be obtained; (As amended by P. L. 1936, Ch. 251.)

(c) no action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is

to affect the disposition of property or funds owned or controlled by the school district, except as herein provided; if any such school district has in its possession or under its control, or there is in the possession or under the control of the commission, any property or funds of such school district which are or may be available for the payment of interest or principal upon any of the debts of such school district (over and above the payment of the current operating expenses of the school district and the maintenance of a reasonable working capital), then such school district in its discretion may apply, or if directed by the commission shall apply, to the Supreme Court to determine the application and distribution of such property or funds to and among the creditors of the school district and in any such case the Supreme Court in its discretion may permit an application for relief of the same character to be made by any creditor of the school district; in any such proceedings all creditors of the school district shall be made parties thereto in such manner and upon such notice by publication or otherwise as the Supreme Court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds, in case any such proceeding shall be instituted, the Supreme Court may direct the municipality to make no payments from any of such moneys so available until the determination of the proceeding or until permitted by the Supreme Court; unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the Municipal Finance Commission;

(d) upon the application of any creditor made upon notice to the school district and the commission, the Supreme Court may vacate, modify or restrict any statutory stay contained in this article. (As amended by P. L. 1936, Ch. 251.)

Appendix B.

SECTION 35 OF THE EXECUTION ACT.

2 N. J. Compiled Statutes (1910) p. 2256, Section 35.

35. Execution against school district; service on township assessors and collectors; levy of tax.—Sec. 1. That when any execution shall be issued against any school district of this state, or against the trustees of any such school district as a body corporate representing such school district, by any court authorized to issue the same, whether upon a judgment recovered before or subsequent to the passing of this act, and there shall be no property belonging to said school district or body corporate sufficient to satisfy the same liable to be levied on, then the officer authorized to execute such process shall serve a copy of the same upon the assessor or assessors of the township or townships in which said school district is situate, and also upon the collector or collectors of such township or townships; and upon receipt of such copy or copies, it shall be the duty of such assessor or assessors, at the time of the next regular assessment of school taxes in such school district, to assess and levy in addition to said regular school taxes, the amount due upon said execution, with interest to the time when the same shall be paid to the officer serving such process, upon the inhabitants of said school district and their estates, and upon the taxable property therein; and this tax shall be assessed and collected at the same time and in the same manner and under the same conditions, restrictions and regulations upon the assessor or assessors, collector or collectors as other taxes for school purposes are required to be assessed and collected in such school district; and the amount of this tax when collected shall be a separate fund, and shall be paid over by the collector of the township in which such school district shall be situate, or if such school district be situate in two or more townships then by the collector of that township in which the fraction of the school district containing the schoolhouse is situate, to the officer serving the process. (P. L. 1881, p. 80.)

Appendix C.

SECTION 237 OF THE SCHOOL LAW.

4 N. J. Compiled Statutes (1910) p. 4804, Section 237.

237. Execution against boards of education; service; tax to pay.—Whenever an execution shall be issued against the board of education of a school district or of a union-graded school by any court authorized to issue the same, upon a judgment recovered either before or subsequent to the passage of this act, and there shall be found no property belonging to said school district or union-graded school sufficient to satisfy the same liable to be levied on, then the officer authorized to execute such process shall serve a certified copy of said execution upon the assessor or assessors of the taxing district or districts in which said school district or union-graded school shall be situate, and also upon the collector or collectors of such taxing district or districts. Upon receipt of such copy or copies such assessor or assessors shall, at the time of the next regular assessment of school taxes, assess upon the inhabitants of said school district and their estates, and upon the taxable property therein, in addition to the regular school taxes, the amount due upon said execution, with interest thereon to the time when the same shall be paid to the officer serving such process and the collector or collectors shall levy and collect the same, and said amount, when collected; shall be a separate fund, and shall be paid over by said collector to the officer who shall have served said process. (P. L. 1903 [2d Sp. Sess.] p. 93.)

Appendix D.

SECTION 505 OF THE TAX ACT.

Chapter 236, N. J. Laws of 1918.

505. The municipal clerk or other proper officer of each taxing district shall, on or before the first day of March in each year, transmit to the county board of taxation a copy of the annual taxing ordinance or resolution, or other evidence showing the amount to be raised by taxation for the purposes of the taxing district. When any execution shall be issued upon judgment against any taxing district, and there shall be found no property sufficient to satisfy the same by levy, the officer shall serve a copy of his execution upon the county board of taxation having jurisdiction over said taxing district, and it shall be the duty of the county board of taxation to add the amount due upon said execution, with interest to the first day of June following, to the amounts certified to it to be raised by taxation in said taxing district, and the amount of said execution and interest shall thereupon also be raised by taxation in said taxing district and paid by the collector thereof on or before the fifth day of June following: provided, however, that if the copy of said execution shall not be served upon the county board of taxation before said board shall have determined and fixed the rate for said taxing district for the year, then the amount shall be included by said board in the amount to be raised by taxation in the next following year, and the interest shall be calculated to the first day of June of such year, unless the amount of such execution and interest shall have been included in the taxing ordinance or resolution with the other amounts to be raised by taxation in said taxing district, or unless the execution shall have been satisfied otherwise.

Appendix E.

(Unreported decision.)

Nos. 223 & 241 January Term, 1938.

NEW JERSEY SUPREME COURT.

THE STATE, *ex rel.* CLAUDIA LEA PHELPS, *et als.*,
Relators,

vs.

THE BOROUGH OF FORT LEE, *et als.*,
Defendants.

Submitted January 19th, 1938; decided July 26, 1938; on motion addressed to returns to writs of mandamus.

Before Justices CASE and DONGES.

For the Relators: WURTS & PLYMPTON, Esq.

For the Defendants: LAWRENCE A. CAVINATO, Esq., WILLIAM A. STEVENS, Esq., and E. J. DIMOCK, Esq. (of the New York Bar).

Per Curiam.

In the above entitled cause we have a motion (No. 223) to quash returns to peremptory writs of mandamus and a counter motion (No. 241) to approve the said returns as filed.

Relators, bondholders and creditors of the defendant Borough of Fort Lee, were awarded a writ of mandamus directing the Borough to levy, assess and collect by taxa-

tion for the year 1936 the sum of $132,000 for debt service and to pay the same ratably to all creditors of the municipality. A further peremptory writ of mandamus directed that the sum of $156,560 be assessed and levied for the year 1937 for the same purpose. Defendants, the Municipal Finance Commission, and the Borough and its officers, have filed returns which state that the Borough has assessed and levied the taxes as directed and has collected on account of the 1936 levy the sum of $40,998.11, and has collected no part of the 1937 levy.

The situation appears to be that the defendants have first paid state, and county taxes and the expense of operating the municipal government out of the tax revenues and have then allocated sums to debt service from remaining moneys. We deem this action to be proper in the circumstances. State and county taxes are clearly a prior lien upon tax collections. *Booth* v. *Parnell,* 12 N. J. Misc. Rep. 413. It is likewise of great importance that the municipality continue to function. "The safety and health of the citizen are of prime importance and neither can be endangered because a creditor wants his due." *Piscataway Township* v. *First National Bank of Dunellen,* 111 N. J. L. 412. The difficulty in making collections of taxes levied is well known and is a matter of which the court will take judicial notice.

We think relators are entitled at this time to no more than to have paid to them their proportionate share of the sums which have been collected on account of the levy directed by the mandamus. This they should have.

In this situation we see no necessity for quashing the returns. Nor does it appear necessary to stamp formal approval upon them. They are not in the nature of final returns, but rather an *ad interim* report upon the status of the cause. We think that for the present they should stand with leave to the parties at all times to make such application to the court as changing circumstances may warrant, and with the obligation upon the defendants, of course, to make all possible effort to attain full compliance.

SUPREME COURT OF THE UNITED STATES.

No. 448.—October Term, 1938.

David T. Wilentz, J. H. Thayer Martin and Walter R. Darby, etc., et al., Appellants, *vs.* Sovereign Camp, Woodmen of the World.	Appeal from the District Court of the United States for the District of New Jersey.

[April 17, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether we have jurisdiction to consider the merits of this appeal taken under § 266 of the Judicial Code directly to this Court from the decree of a district court of three judges.

Appellee brought the present suit in equity in the District Court for the District of New Jersey, praying a declaratory decree against the validity of certain provisions of the New Jersey Municipal Finance Commision Act, c. 340, New Jersey Laws of 1931, as amended, and an injunction restraining state and municipal officers from acting pursuant to the Commission Act, on the ground that it impairs the obligation of contract in violation of the federal Constitution by depriving appellee of the remedies existing when the contracts were entered into. The Commission Act provides an elaborate scheme for the control and management of the affairs of any municipality, found by the Supreme Court to be unable to meet its obligations when due, by a commission composed of state officers acting in conjunction with the local municipal authorities. The Act, in its amended form, appears in Title 52, c. 27, §§ 1 to 66, inclusive, c. 24, § 19.1, c. 14, § 32, Title 1, c. 1, § 10, Revised Statutes of New Jersey, 1937.

Appellants, members of the Municipal Finance Commission, and the other appellants, members of the Board of Assessors of the Borough of Runnemede, a New Jersey municipal corporation, and its Tax Collector, were joined as defendants. Decision on an appli-

cation for an interlocutory injunction, presented to the district court of three judges assembled pursuant to § 266 of the Judicial Code, and also on a motion of appellants to remit the case to a single district judge, was reserved, and the court, after hearing, rendered its final decree sustaining appellants' contention that the challenged statute was unconstitutional and granting relief by injunction against all the appellants. The case comes here on appeal under §§ 238 and 266 of the Judicial Code. 28 U. S. C. §§ 345, 380.

Appellants press here the objection made below that the case is not one for a court of three judges as prescribed by § 266 of the Judicial Code, and that consequently this Court is without jurisdiction to pass on the merits of the appeal taken directly from the district court, a contention which requires our consideration of the nature of the cause of action and of the relief sought and awarded. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386.

The bill of complaint states that appellee, a fraternal benefit life insurance association, organized under the laws of Nebraska, purchased on June 1, 1930, school bonds issued by the Board of Education of the Borough of Runnemede, which is coterminous with the school district of Runnemede; that default having occurred in the payment of principal and interest on the bonds remaining unpaid, appellee brought suit upon them in a federal court and on December 5, 1935, recovered a judgment against the Board of Education in the sum of $21,776.21, execution upon which was returned unsatisfied; and that appellee then began in the federal district court for New Jersey a suit for mandamus, which is still pending undecided, to compel the proper officers of the Borough to assess and collect taxes for payment of appellee's judgment.

The bill of complaint further alleges that appellee's contract, acquired by the purchase of the bonds, has been impaired in violation of the contract clause of the Constitution (Art. I, § 10) by the later enactment of c. 195, and § 17 of c. 258, New Jersey Laws of 1935, which extended the stay provisions of the State Municipal Finance Commission Act (§§ 351, 352, 354, Municipal Finance Commission Act, as amended by §§ 8, 9, c. 330, New Jersey Laws of 1933, c. 191, New Jersey Laws of 1935) to a school district whenever the Commission shall function in a municipality which is coterminous with the school district. In that event § 17 stays suits and proceedings for recovery on school bonds of the municipality and stays exe-

cution on judgments in such suits, except that the Supreme Court or one of its justices is given discretionary power on application, prescribed by the statute, to authorize the suit to proceed, or execution to issue, under conditions calculated to secure equality of treatment of all creditors.

Section 103 of the Municipal Finance Act provides that upon petition of a municipality showing that it "is not in a position to meet its obligations when due", a justice of the Supreme Court is authorized to make an order to that effect, whereupon the "commission shall function" in that municipality "with all the powers and duties conferred by this act". It is alleged in the bill of complaint, and was found below, that a justice of the Supreme Court had determined that the Borough of Runnemede was unable to meet its obligations and that the Commission, pursuant to the statute, then commenced to function and has since functioned in the Borough and in its coterminous school district.

As a further impairment of appellee's contract the bill of complaint alleges that in 1930, when the school district bonds were issued, the statutes of New Jersey provided that taxes levied on property within the state should be paid only in lawful money of the United States, but that § 6 of c. 330 of the New Jersey Laws of 1933 authorizes the governing body of a municipality in which the Commision is functioning to compromise and adjust delinquent taxes due the municipality, except claims for taxes in excess of $500, which may not be so compromised without the written assent of the Commission; that acting under these provisions the Commission has given its written assent to compromises previously authorized by the Runnemede Borough Council, whereby bonds were received in payment of taxes due the Borough in excess of $500, thus impairing the security and obligation of appellee's bonds.

The bill of complaint prays a judicial declaration that appellee's right to compel a levy and collection of taxes for the satisfaction of its judgment is governed by § 35 of the Execution Act of New Jersey, 2 Comp. Stat. of New Jersey, p. 2255, and § 237 of the School Law of New Jersey, 4 Comp. Stat. of New Jersey, p. 4804, in force in 1930, when the school bonds were issued; that the statutes assailed, c. 330, New Jersey Laws of 1933, cs. 195 and 258, New Jersey Laws of 1935, all as amended and supplemented, be declared unconstitutional and void as infringing the contract clause; that the Commission be enjoined from functioning in the Borough of

Runnemede and from assenting to the compromise of delinquent taxes of the Borough for any sum less than the full amount due, and that appellant Tax Collector be enjoined from carrying into effect any such compromise; that appellants, the Borough's Assessors and its Tax Collector, be enjoined from assessing and collecting taxes for the year 1936 without including in them the amount of appellee's judgment.

The trial court sustained the allegations of the bill by its findings and granted the relief prayed, except that it declined to enjoin any action by the Assessors and Collector with respect to the assessment and collection of 1936 taxes. In enjoining the Commission from functioning in the Borough the court directed that its decree should be "without prejudice to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce its judgment." The decree in its practical operation thus enjoined no action by the Commission and amounted to no more than a declaration that the stay provisions of the challenged statute were invalid and unenforceable.

By § 266 of the Judicial Code, a suit in which application is made and pressed for an interlocutory injunction "restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission" is required to be heard by a court of three judges constituted as the section prescribes. The section also declares that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Our jurisdiction to hear the appeal on the merits, which is now challenged, turns upon the question whether the present is "such suit".

The reasons for the adoption of the extraordinary procedure prescribed by § 266 of the Judicial Code in the class of cases defined by it, and the rule that it may be invoked only when the suit is one to restrain state officers, have often been pointed out. *Ex parte Collins*, 277 U. S. 565, *Ex parte Public National Bank*, 278 U. S. 101; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, *supra*. This requirement is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers.

whose action is not the effective means of the enforcement or execution of the challenged statute. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* 391.

By its terms § 266 embraces only those cases in which an interlocutory injunction is sought to prevent the operation of a state statute "by restraining the action" of a state officer "in the enforcement or execution of such statute". Here it appears on the face of the bill of complaint, and from the findings, that the statutes assailed as unconstitutional are those prescribing a stay of suit or execution against any municipality and its coterminous school district in which the commission is functioning, and also the statute which permits a compromise of delinquent taxes by such a municipality and school district. The only state officers against whom an injunction is sought are the members of the Commission. But they are clothed with no authority to enforce the challenged statutes and have taken no steps to enforce them. The stays prescribed by the statute become effective with respect to any particular municipality by virtue of other statutory provisions whenever the state Supreme Court finds that the municipality is unable to meet its obligations. The order of the Supreme Court promulgating its finding is the decisive action which calls the stay provisions into operation, and when that action is taken the statute becomes self-executing. The Commission is thus without power to grant or withhold a stay, and as the form of the decree, already noted, shows, there is no occasion to enjoin action by the Commission as the means of preventing operation of the stay provisions.

The Commission is similarly without authority to enforce the provisions of the Act of 1933, authorizing the compromise of delinquent taxes. Its written assent, prerequisite to execution of a compromise which the Commission cannot command, is not an order within the meaning of § 266. *Great Northern Railway* v. *United States,* 277 U. S. 172. The Borough Council, whose members are not state officers and are not parties to the present suit, is the exclusive agency for arranging the compromise. The effective agent for carrying the statute into execution is appellant Borough Tax Collector, who is not a state officer. The functions which the Council and the Collector perform, affecting the collection of taxes for payment of the local school district bonds, are not state, but local functions, and a suit for an injunction restraining such action by local officers is not within § 266. *Ex parte Collins, supra; Ex Parte Public National Bank of New York, supra;* cf. *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89.

Even though the written assent of the Commission, without which there can be no compromise of tax claims in excess of $500, be said to be action in "execution" of the statute, we think this case is not one for a court of three judges, because the injunction sought against the Commission is but incidental to the sole purpose of the suit to prevent the performance by local officers of a local function. The members of the Commission are not necessary parties to the suit, and there is no occasion for relief against them in addition to that sought against the Collector. The Commission, in the performance of its statutory duty, acts only to approve the exercise by local officers of an authority conferred on them as such. A suit to restrain the latter from carrying into execution a state statute by performance of the local function which it authorizes is not to be brought within the purview of § 266 by the expedient of adding as nominal parties state officers whose presence is not necessary to prevent the operation of the challenged statute and whose only action is the approval of that of local officers to be taken under it. In such circumstances their presence in the suit generates no interest which it is the purpose of § 266 to protect and must be regarded as colorable only for the purpose of securing the advantages of proceeding before a court of three judges, as was the presence of the state officers in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* where it was held that there was no appeal under § 266.

The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application. *Ex parte Collins, supra; Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* 391. Here the issue is not one of jurisdiction of the district court as a federal court, see *Ex Parte Poresky,* 290 U. S. 30, 31; *Healy* v. *Ratta,* 292 U. S. 263, but is whether a final hearing by three judges is prescribed by the section and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson,* 273 U. S. 388. As the case was not one for which a court of three judges is prescribed by § 266, no appeal lies to this Court and it is without jurisdiction to hear the merits of the appeal.

In the exercise of its appellate jurisdiction, this Court has authority to give such directions as may be appropriate to enforce

the limitations of § 266, and may frame its mandate in such manner as will save to appellants their appropriate remedy by appeal to the proper court. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra; Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16. But as is indicated by the briefs, appellants have already taken an appeal from the decree below to the Court of Appeals for the Third Circuit, and it thus appears that their remedy will be preserved by dismissing the appeal to this Court without more.

The appeal will be dismissed with costs to appellants. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 387; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra.*

Appeal dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.